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In the

Supreme Court of the United States

October Term, 1994

MICHAEL Q. JONES, INC.
Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,
Respondents.

**Petition for Writ of Certiorari
to the Court of Appeal,
State of California, Fifth Appellate District**

PETITION FOR WRIT OF CERTIORARI

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82

QUESTIONS PRESENTED FOR REVIEW

1. Do the heightened standards of judicial review in regulatory takings cases, mandated by this Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, apply to financial exactions in the form of development impact mitigation fees?

2. Does a county's development fee, based on a 30-year extrapolation of a one-time general fund revenue shortfall, imposed with no showing of any relationship to adverse impacts attributable to the owner's proposed use of his land, effect an unconstitutional taking of private property?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES CITED vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW HAS CONTRIBUTED TO A GROWING CONFLICT BETWEEN CALIFORNIA COURTS AND THE UNITED STATES SUPREME COURT IN RESOLVING FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT . . . 9

Page

A. The State Courts of California Have Consistently Refused to Apply the Heightened Standards of Review Set Forth by This Court in Nollan v. California Coastal Commission and Dolan v. City of Tigard 10

B. The Court Below, Following the Trend in California, Failed to Apply This Court's "Essential Nexus" Standard to Jones' Federal Takings Claim 12

C. The Determination That the County Fee Complies with Dolan Is Completely Unsupported by the Record Before the Court of Appeal 14

D. The Court Below Did Not Require the County to Meet Its Burden of Proof 16

E. Because the County Has Failed to Carry Its Burden of Proof as Required by Dolan, It Is Immaterial Whether Jones Set Forth His Interpretation of the County Study in His Response to the County's Statement of Facts 18

Page

II. THE DECISION BELOW HAS CONTRIBUTED TO A GROWING CONFLICT BETWEEN THE STATE COURTS OF CALIFORNIA AND NEW YORK IN RESOLVING FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT 20

A. The Opinion Below Is the Latest in a Series of California Decisions That Conflict with the Treatment of Federal Takings Issues by the New York State Court of Appeals 20

B. The Conflict Between the New York and California Courts Has Intensified Because New York Now Follows This Court's Dolan Decision While California Does Not . . . 22

C. The Opinion Below Highlights the Conflict in the Treatment of Federal Takings Claims by the New York and California Courts 23

CONCLUSION 24

Page

TABLE OF AUTHORITIES CITED

Cases

Agins v. City of Tiburon,
447 U.S. 225 (1980) 10,23

Blue Jeans Equities West v. City
and County of San Francisco,
3 Cal. App. 4th 164 (1992) 8,10-12,21,23,25

Chicago, Burlington, & Quincy
Railroad Co. v. City of Chicago,
166 U.S. 226 (1897) 9

City and County of San Francisco v.
Golden Gate Heights Investments,
14 Cal. App. 4th 1203 (1993) 8,11

Del Oro Hills Estates v. City of
Oceanside, 31 Cal. App. 4th 1060 (1995) 8,22

Dolan v. City of Tigard, 512 U.S. ___,
129 L. Ed. 2d 304 (1994) . . . . . *passim*

Ehrlich v. City of Culver City,
15 Cal. App. 4th 1737 (1993) 8,11-12

Ehrlich v. City of Culver City,
512 U.S. ___, 129 L. Ed. 2d 854 (1994) 5,12,25

Ehrlich v. City of Culver City,
62 U.S.L.W. 3456 (Jan. 11, 1994) 12

Page

Manocherian v. Lenox Hill Hospital,
643 N.E.2d 479, 618 N.Y.S.2d 857 (1994) 8,22,24-26

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) . . . . . *passim*

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 9

Saad v. City of Berkeley,
24 Cal. App. 4th 1206 (1994) 8,11

Seawall Associates v. New York,
138 Misc. 2d 96, 523 N.Y.S.2d 353,
366 (Sup. Ct. N.Y. Cty 1987) 21

Seawall Associates v. City of
New York, 542 N.E.2d 1059,
cert denied, 493 U.S. 976 (1989) 8,21-22,24

Tahoe Keys Property Owners' Association v.
State Water Resources Control Board,
23 Cal. App. 4th 1459 (1994) 8,11

Westwinds Mobile Home Park v.
Mobilehome Park Rental Review Board,
30 Cal. App. 4th 84 (1994) 8,11

Yee v. City of Escondido, 503 U.S. ___,
118 L. Ed. 2d 153 (1992) 11

Page

Statute

28 U.S.C. § 1257(a) 2

Rule

United States Supreme Court Rule 13.1 2

United States Constitution

Fifth Amendment 2,9,19,26

Fourteenth Amendment 2,9,26

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COUNTY OF TUOLUMNE and
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished decision of the California Court of Appeal, Fifth Appellate District, is reproduced as Appendix (App.) A. The unpublished order of the Superior Court of the State of California, County of Tuolumne, is reproduced as Appendix B. The unpublished denial of Jones' petition for

rehearing by the Court of Appeal is reproduced as Appendix C. The unpublished denial of Jones' petition for review to the California Supreme Court is reproduced as Appendix D.

STATEMENT OF JURISDICTION

The decision of the Fifth District Court of Appeal of California was entered on November 3, 1994. App. A-1. Petitioner filed a timely petition for rehearing of the case on November 18, 1994, which was denied by the Court of Appeal on November 21, 1994. App. C-1. Petitioner then filed a timely petition for review to the California Supreme Court on December 9, 1994, which the court denied on January 25, 1995. App. D-1. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the United States Supreme Court Rules. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.

The statute at issue is Tuolumne County (California) Ordinance No. 1796, adopted October 23, 1990 (reproduced as Appendix E). County Ordinance No. 1796 authorized the

adoption of Resolution No. 381-90 (reproduced as Appendix F), establishing the amount of the fee at issue.

STATEMENT OF THE CASE

Michael Q. Jones, Inc. (Jones) is a small residential builder engaged in the construction of affordable housing in Tuolumne County, California (County). On February 26, 1991, Jones applied for a permit to construct a single-family manufactured home on a residential lot. As a condition to issuing this permit the County required Jones to pay a "County Services Impact Mitigation Fee" (County Fee) in the amount of $1,723.81.[1] Joint Appendix on Appeal (JA) at 325-26.

This fee was imposed with no inquiry whatsoever into the fiscal, environmental, or other impacts of the construction of Jones' manufactured home. The amount of the fee was wholly determined by a review of the County's 1988-89 operating budget, undertaken more than two years prior to Jones' decision to build. JA at 326-27. This budgetary review, the Tuolumne County Government Cost and Revenue Study: An Analysis of Current 1988 and Future 2020 Impacts to On-Going and One-Time General Fund Costs and Revenues (County Study) was prepared at the County's direction in order to provide a new revenue source for the County. JA at 169. The County Study has been reproduced and lodged with this Court concurrently with the filing of this petition.

Although its content is obscured by needless jargon, the County Study is actually a very simple document. First,

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[1] The County Fee was authorized by Tuolumne County Ordinance No. 1796, adopted on October 23, 1990. The amount of the fee was established by Resolution No. 381-90, adopted by the board of supervisors on December 4, 1990.

the County Study examines certain arbitrarily selected general fund accounts from the County's 1988-89 operating budget. County Study at 5-6, 15-16, 17-20. Second, the County Study determines that, in these selected accounts for a single fiscal year, the County's expenditures exceeded its revenues by $146.37 per resident. County Study at 21-22. Third, this arbitrarily conceived "deficit" (as it is called in the County Study) is extrapolated over 30 years as if it were an annually recurring shortfall. County Study at 20, 22. Finally, this completely spurious 30-year "deficit" is capitalized at a discount rate of 7% and divided by the number of dwelling units expected to be constructed in the County over the same 30-year period. JA at 172. This amount comprises the major (ongoing) portion of the fee that was charged to Jones. *Id.* The same amount will be charged to all proposed residential units constructed from 1991 to 2020, unless the ordinance is revised or repealed.

Jones paid the County Fee under protest and on April 3, 1991, filed a complaint to determine the validity of the exaction. Jones raised his federal constitutional claim in the trial court at the outset, alleging in his complaint that there was no essential nexus between the County Fee and any adverse impact of his proposed construction, as required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). JA at 3-7.

In the trial court proceedings, the County placed the County Study in evidence and moved for summary judgment on the grounds that, as a matter of law, the mitigation of the County's spurious 30-year "deficit" satisfied *Nollan's* nexus requirement. The County's motion was granted and summary judgment was entered on August 20, 1992. The trial court's order expressly rejected Jones' federal constitutional claim under *Nollan*. However, the court demonstrated its failure to grasp *Nollan's* essential nexus requirement in its garbled holding:

> The nexus between the fee provision of the defendant County Ordinance and Resolution at issue is designed to further the County's legitimate interest in development and the consequent burden of maintaining its required level of public services and facilities.

App. B-3. Although it is impossible to make grammatical sense of this ruling, it is clear that whatever the trial court thought "nexus" means, it has nothing to do with the actual impact of Jones' proposed use of his property.

On appeal, Jones again raised his federal constitutional claim under *Nollan* in his opening brief to California's Fifth District Court of Appeal. While Jones' appeal was pending, this Court strengthened its standards of review for regulatory takings in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994). Under *Dolan*, governments imposing development exactions challenged under the Takings Clause must bear the burden of proving their legitimacy. 129 L. Ed. 2d at 320 n.8. Meeting this burden of proof requires a showing of an individualized, quantified determination that the exaction is roughly proportional to the adverse impact on the community of the owner's proposed use of his land. *Dolan*, 129 L. Ed. 2d at 319-20. This Court immediately emphasized the applicability of *Dolan* to development fees by vacating the decision of the California Court of Appeal in *Ehrlich v. City of Culver City*, and remanding for reconsideration in view of *Dolan*. 512 U.S. ___, 129 L. Ed. 2d 854 (1994). *Ehrlich* involved a development fee similar to the one at issue in this litigation, but with a far stronger showing of a relationship to the actual impact of the proposed property use. The Fifth District Court of Appeal requested and received supplemental briefing on *Dolan* and *Ehrlich* and their applicability to the case at bar.

In the proceedings below, the County advanced no evidence that it had conducted any inquiry whatsoever into the probable impact of Jones' proposed construction of a

single-family affordable home. In fact, the County stated repeatedly that it had not conducted any such individualized determination and argued that it was not required to do so. JA at 148, 149-50, 339, 345, 348-49. The County acknowledged that the amount of the County Fee was wholly determined by the excess of spending over revenue in its 1988-89 general fund budget--spending which had occurred two years before Jones applied for a building permit and could not have been affected in any way by Jones' use of his land. JA at 126-30. According to the County, this one-time revenue shortfall, arithmetically projected over 30 years and applied to Jones by simple arithmetic averaging, "*is* the fee." JA at 342:27.

In its decision dated November 3, 1994, the Fifth District Court of Appeal upheld in its entirety the trial court's granting of summary judgment for the County. Despite the County Study's repeated references to the County's 1988-89 general fund deficit as the sole basis of the County Fee, the appellate panel found that nothing in the study "even vaguely reveals that the fees in issue were based upon a general fund deficit in 1989 or any other year." App. A-22.

Far more serious than this flat contradiction of the evidence before it, the Court of Appeal went on to rule that the County Study's superficial review of prior years' revenues and expenditures in selected budget accounts fulfilled *Dolan's* requirement of an "'individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development.'" App. A-18-19 (citation omitted; brackets in original).

If allowed to stand, this ruling would vitiate *Dolan* of any practical significance. If an appellate panel may determine that an "***individualized determination***" means the same thing as manipulating selected budget accounts from 2 to 30 years prior to the permit application in question, then the plain language of this Court has been deprived of all meaning.

Finally, recognizing the patent flaws in the County's argument, the court below went outside the record to ***presume*** the existence of facts sufficient to meet the County's burden of proof. The opinion below recognizes that the budget accounts reviewed by the County Study are limited to those in which aggregate expenditures exceeded revenues for 1988-89. App. A-22. By implication, the County Study must intentionally suppress budget accounts in which revenues exceeded expenditures in the base year, in order to present a false picture of financial crisis that could be used to justify a new revenue source for the County. In response to its recognition that the County had failed to carry its burden of proof, the Court of Appeal fell back on a judicial presumption of facts not in the record:

> [I]t does not appear surprising that the [County Study] apparently excluded from consideration those general fund categories which the investigators believed would not have been sensitive to development and population growth within the county .... ***Presumably, had revenues been found to be sufficient to cover the costs of the services in question, there would have been no need to levy the fees in issue ....***

App. A-22-23 (emphasis added).

This ruling directly conflicts with the established doctrine of this Court. By sweeping aside *Dolan's* ruling that governments which impose exactions must bear the burden of proving their legitimacy, the court below deprived Jones of federal constitutional protections guaranteed under the Takings Clause. If this Court's requirement of an individualized, quantified determination can be met by careless comparisons of arbitrary averages, conducted up to 30 years before a permit application is filed, the requirement is reduced to a nullity.

REASONS FOR GRANTING THE WRIT

The decision below is the latest in a line of opinions in which the state courts of California have refused to follow the United States Supreme Court on federal constitutional issues arising under the Takings Clause. The regulatory takings standards set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, and in *Dolan v. City of Tigard*, 129 L. Ed. 2d 304, stand in direct conflict with a growing number of California appellate decisions, including *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992); *Tahoe Keys Property Owners' Association v. State Water Resources Control Board*, 23 Cal. App. 4th 1459, 1477 (1994); *Saad v. City of Berkeley*, 24 Cal. App. 4th 1206, 1212-13 (1994); *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1749 (1993); *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th 1203, 1209 (1993); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board*, 30 Cal. App. 4th 84, 90 (1994); *Del Oro Hills Estates v. City of Oceanside*, 31 Cal. App. 4th 1060, 1074 (1995); and the case at bar.

Not only do these California decisions directly conflict with the holdings of this Court, they have also come into conflict with opinions of the highest state court of New York on federal takings issues. The decisions cited above stand in direct opposition to the opinions of the New York Court of Appeals in *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068, *cert. denied*, 493 U.S. 976 (1989); and in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994).

This Court should grant certiorari in order to resolve the conflict between the California judiciary and this Court on the one hand, and between the highest state courts of California and New York on the other, with respect to federal constitutional issues arising under the Takings Clause.

Certiorari should also be granted in order to provide guidance to the California courts, state and local regulatory agencies, and property owners on regulatory takings issues; and to reestablish the authority of the United States Supreme Court on questions of federal constitutional rights under the Supremacy Clause.

I

THE DECISION BELOW HAS CONTRIBUTED TO A GROWING CONFLICT BETWEEN CALIFORNIA COURTS AND THE UNITED STATES SUPREME COURT IN RESOLVING FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

For more than 70 years it has been recognized that government regulation can so attenuate the rights of property ownership as to effect a Fifth Amendment taking. The criterion first laid down by Justice Holmes in 1922 applies with equal force today: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The process of determining when a regulation "goes too far" has been revealed gradually by a line of decisions extending from *Pennsylvania Coal* down through this Court's most recent decision in this field, *Dolan v. City of Tigard*, 129 L. Ed. 2d 304.

This Court has frequently set forth its core standard, that land use regulations will effect a taking if they fail to substantially advance legitimate state interests, or if they

deny an owner economically viable use of property. *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980). The two elements of this test are stated in the disjunctive; *either* prong is independently sufficient to establish a regulatory taking as a matter of law.

In the landmark 1987 decision, *Nollan v. California Coastal Commission*, this Court focused on the first prong of this two-part test. The *Nollan* decision demonstrates that when a land use regulation fails to substantially advance a legitimate governmental interest, regardless of the economic impact on the property owner, a taking occurs.

Moreover, this Court specified in *Nollan* that property regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. 483 U.S. at 834 n.3. Development exactions must be shown to have an ***essential nexus***, or close relationship, to the mitigation of specific public harms that would otherwise be caused by the owner's proposed use of his property. 483 U.S. at 837.

A. The State Courts of California Have Consistently Refused to Apply the Heightened Standards of Review Set Forth by This Court in Nollan v. California Coastal Commission and Dolan v. City of Tigard

Instead of accommodating the mandate of this Court, the California judiciary responded to *Nollan* by mischaracterizing the decision as a physical invasion case which did not apply to regulatory takings. The most notorious example in this line of decisions is *Blue Jeans Equities West v. City and County of San Francisco*, in which the California Court of Appeal proclaimed that *Nollan* applies only to "possessory" takings--even though no such term appears in the text of *Nollan* or in any other decision ever issued by this Court! 3 Cal. App. 4th at 169.

Although the *Blue Jeans Equities* holding was flatly preposterous on its face, it has been embraced by a majority of California's appellate districts as a means to avoid applying *Nollan's* requirement of heightened scrutiny to property regulations. *See Tahoe Keys Property Owners' Association v. State Water Resources Control Board*, 23 Cal. App. 4th at 1477; *Saad v. City of Berkeley*, 24 Cal. App. 4th at 1212-13; *Ehrlich v. City of Culver City*, 15 Cal. App. 4th at 1749; *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th at 1209.

Even after this Court's express citation to *Nollan* as the standard applicable to nonphysical takings in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 167 (1992), California courts have persisted in following the erroneous doctrine of *Blue Jeans Equities*, interpreting "possessory taking" to denote what the Supreme Court has always called a physical taking. Just last year, in *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board*, a California appellate court refused to apply *Nollan* to a regulatory takings case, asserting that "*Nollan* involved a statute which physically appropriated property"--despite the fact that no statute of any kind was at issue in *Nollan*, and no physical appropriation of property occurred or was alleged by either party. 30 Cal. App. 4th at 90.

The refusal of California's appellate courts to follow *Nollan* was highlighted in 1994, when this Court reiterated and strengthened its requirement of heightened scrutiny in nonphysical takings cases. In *Dolan v. City of Tigard*, this Court held that land use regulations challenged under the Takings Clause must be justified by a showing that the burden of the regulation is roughly proportional, in nature and extent, to the public harms that would otherwise be caused by the proposed property use. 129 L. Ed. 2d at 320.

On the next court day following the *Dolan* decision, this Court clearly signaled that the *Nollan* and *Dolan* standards

apply to monetary exactions such as the development fee at issue in this case. In *Ehrlich v. City of Culver City*, 129 L. Ed. 2d 854, this Court vacated a decision of the California Court of Appeal upholding the imposition of two development fees as a condition to the issuance of a building permit. The California court had declined to follow *Nollan*, holding that "[m]onetary exactions compelled as a condition of approval must be only rationally related to the governmental purpose." 15 Cal. App. 4th at 1749 (citing *Blue Jeans Equities*). Ehrlich's petition for certiorari had specifically asked this Court to affirm that *Nollan*'s heightened standard of review applies to regulatory takings in the form of development fees. *Ehrlich v. City of Culver City*, 62 U.S.L.W. 3456 (Jan. 11, 1994). By vacating the decision of the Court of Appeal and remanding *Ehrlich* with instructions to reconsider in light of *Dolan*, this Court seemingly eliminated any doubt that it intends the heightened standards of *Nollan* and *Dolan* to apply to financial exactions such as the County Fee.

Notwithstanding the plain guidance of this Court, however, the court below continued to cite *Blue Jeans Equities* for the proposition that *Nollan's* heightened standard of review does not apply to regulatory takings. App. A-9. Thus, the decision below extends an unbroken line of California cases that decide federal takings issues in a manner that directly conflicts with the settled jurisprudence of this Court.

B. The Court Below, Following the Trend in California, Failed to Apply This Court's "Essential Nexus" Standard to Jones' Federal Takings Claim

Following the trend in California decisions as set forth above, the court below chose not to apply the essential nexus test required by this Court in *Nollan*. App. A-9-10. Had the California court complied with *Nollan's* mandate of

heightened scrutiny, it would have had no choice but to strike down the County Fee as a regulatory taking.

To satisfy *Nollan's* essential nexus standard, the County is required to advance evidence sufficient to establish--under an elevated standard of review--that its development exaction bears a close relationship to the mitigation of public burdens that would otherwise result from Jones' proposed use of his property. *Nollan*, 483 U.S. at 834 n.3, 837. The record before the Court of Appeal was completely devoid of any such evidence.

The County Study, introduced into evidence as the County's sole justification for its fee structure, painstakingly demonstrates that the fee in question is based on a simple 30-year extrapolation of a one-time revenue shortfall in the County's 1988-89 operating budget. County Study at 17-22. The County Study is explicit in identifying the basis of the fee as a "deficit" in selected 1988-89 general fund accounts. County Study at 20. Lest the point be missed, the County Study employs the synonymous terms, "negative net balance" and "negative balance" in referring to the 1988-89 deficit that forms the basis of the fee:

> Table 9 presents the cost/revenue comparisons per capita and per employee. As shown, residents of the unincorporated area generate a ***negative net balance***. ...
>
> ... As shown, all categories generate a ***negative balance*** for the County's general fund. County-wide in the year 2020, the residential base is projected to generate a ***net deficit*** of $2,532,000 ....

County Study at 20 (emphasis added).

In its motion for summary judgment, the County refers to this deficit as "the difference between the costs that the County must incur in order to maintain the current levels of service and the revenues that the new development will produce." JA at 342. Yet the evidence advanced by the

County shows that this "difference" was calculated solely on an extrapolation of a prior deficit and not from an analysis of how ***new*** development would give rise to ***new*** impacts or costs. Indeed, the County considers the relationship between the extrapolated 1988-89 deficit and the amount of the fee that was imposed on Jones to be so obvious that it has stated that the "deficit" identified in the County Study actually ***is*** the fee! JA at 342.

Even if the court below chose to decide the issue without reference to any evidence or testimony presented by Jones, the County's own evidence proves that its fee was determined with absolutely no reference to any impact attributable to Jones' proposed use of his property. The essential nexus required by *Nollan* is wholly absent. Had the court below applied any standard of review greater than total deference to the County's assertions, the County Fee could not have withstood this initial inquiry.

C. The Determination That the County Fee Complies with Dolan Is Completely Unsupported by the Record Before the Court of Appeal

Instead of strictly scrutinizing the County's proffered justifications of its development fee, the Court below simply repeats lengthy excerpts of the County's assertions concerning the sham study conducted at the County's direction. App. A-11-17. Following this recitation, the court concludes: "We find the facts produced by the County ... sufficient to support a determination as a matter of law that the fees in issue reflected an 'individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development.'" App. A-18-19 (citing *Dolan*, 129 L. Ed. 2d at 320) (brackets in original).

This holding lacks any evidentiary support, and amounts to a repudiation of *Dolan*.

As elaborated by this Court in *Dolan*, the government is required to establish, through individualized determinations, that a land use exaction is ***roughly proportional*** to the impact of the owner's proposed use of his property. 129 L. Ed. 2d at 320. Nowhere in the lengthy extracts of the County's pleadings, or in the County Study, or in the full record in this case, could the court below identify a single instance wherein the County even alleged that it conducted any individualized findings as to the impact of Jones' proposed use of his property. Indeed, the record shows that the County has consistently argued that it declined to conduct such individualized findings because it regarded them as unnecessary. JA at 148, 149-50, 339, 345, 348-49.

The statement of facts submitted by the County in support of its motion for summary judgment establishes that the County Fee was based on a generalized study of County finances undertaken more than two years before Jones applied for the permit in question. Nothing in the County's evidence carries the slightest implication of an individualized determination with respect to Jones' proposed project, beyond a determination that the fee would be imposed. The City of Tigard offered far stronger evidence of an individualized determination and close nexus with respect to the exaction imposed on Mrs. Dolan, which was struck down by this Court.[2]

No evidence cited by the court below suggests that the County Fee bears any relationship whatever to the actual impact of Jones' proposed use of his property, much less the

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[2] The City of Tigard prepared, for example, a traffic input study which purported to quantify the increase in traffic that would be caused by Mrs. Dolan's larger store. Because the study failed to relate ***this*** increase in traffic with any specific reduction in traffic caused by a bicycle path, the bicycle path exaction was reversed. 129 L. Ed. 2d at 323.

rough proportionality required by *Dolan*. The Court of Appeal simply repeats and endorses the County's misinterpretation of the legal significance of the facts placed in evidence. App. A-11-17. Far from applying the elevated standard of review mandated by *Nollan* and *Dolan*, the opinion below rests on extreme deference to the County's assertions and a reluctance to look behind the fragile facade of legitimacy concocted by the County's hired consultants.

D. The Court Below Did Not Require the County to Meet Its Burden of Proof

In *Dolan*, this Court established that local governments defending development exactions challenged as regulatory takings must bear the burden of proof as to the legitimacy of those measures. *Dolan*, 129 L. Ed. 2d at 320 n.8. In the proceedings below, the County failed to produce any evidence whatsoever that its fee was closely proportional to any adverse impacts of Jones' proposed use of his land. The County failed to produce any evidence of an individualized determination of the impact of Jones' proposed construction. In fact, the County has plainly stated on the record that it has never undertaken the type of individualized determination required by this Court in *Dolan*.

Because of the County's manifest failure to carry its burden of proof on these matters, *Dolan* mandates a decision in favor of Jones. Instead of complying with this Court's assignment of the burden of proof, however, the court below ***assumed the existence of facts not in evidence*** in order to justify the County's actions.

The decision below frankly acknowledges that the budget accounts examined by the County Study were arbitrarily selected to lead to the very conclusions the County had paid its consultants to reach. In the more gentle terms of the court below, "the identified sub-categories [of the County Study] do not include all of the components of the county general fund for 1989." App. A-22. In other words, the

California court recognized that the County Study selectively presents budget categories in which aggregate 1988-89 spending exceeded revenues. The self-evident implication is that the study intentionally *suppresses* offsetting accounts in which 1988-89 revenues exceeded spending.

Plainly put, in order to create the illusion of a revenue shortfall in 1988-89, the County Study deliberately distorts the County's true fiscal position by presenting selectively biased data. The court below clearly perceived this ploy, correctly noting that the overall County budget had to be balanced as a matter of state law. App. A-22. At this juncture, the heightened scrutiny required by *Nollan* and *Dolan* demands a reversal of the trial court's ruling. The County bears a heavy burden of proving that there was some legitimate reason for suppressing and manipulating data to create the illusion of a fiscal crisis to justify imposing the County Fee. This burden has not been met.

Instead of carrying out the plain mandate of this Court, however, at this point the court below leaped outside the record to provide its own rationalization of the County's actions:

> [I]t does not appear surprising that the [County Study] apparently excluded from consideration those general fund categories which the investigators believed would not have been sensitive to development and population growth within the county .... Presumably, had revenues been found to be sufficient to cover the costs of the services in question, there would have been no need to levy the fees in issue ....

App. A-22-23.

There is no basis for such a presumption in the record. The County Study fails to demonstrate that spending levels in ***any*** of the County's 1988-89 general fund accounts were in fact determined by development and population growth,

rather than by the arbitrary decisions of County officials in 1988-89. Whether some accounts were more sensitive to these factors than others, and to what extent, should have been demonstrated in the County Study itself--had that document been a legitimate research study, rather than a sham rationalization of the County's quest for increased spending power. Faced with the utter lack of such a demonstration, the court below helpfully stepped into the breach and fabricated its own justification of the County's conclusions by presuming facts not in the record.

By refusing to hold the County to its burden of proof, the court below has created a direct conflict with the regulatory takings doctrine of this Court.

By presuming the existence of facts sufficient to justify the County's actions, the Court of Appeal erroneously reverted to the deferential standard of review applied in California courts prior to *Nollan* and *Dolan*. Under the standards set forth by this Court and in view of its obligations under the Supremacy Clause, the court below lacks the constitutional authority to simply turn its back and acquiesce in the County's calculated violation of fundamental constitutional rights.

E. Because the County Has Failed to Carry Its Burden of Proof as Required by Dolan, It Is Immaterial Whether Jones Set Forth His Interpretation of the County Study in His Response to the County's Statement of Facts

In filing cross motions for summary judgment in the trial court, the parties agreed that this action presented no triable issues of material fact. The sole issue in dispute was whether, ***as a matter of law***, the spurious "deficit" identified by the County Study fulfilled *Nollan's* essential nexus requirement.

In the course of affirming the grant of summary judgment to the County, the Court of Appeal erroneously

held that Jones' interpretation of the County Study was barred because Jones failed to allege the existence of a triable issue of fact. App. A-23-24. In the context of cross motions for summary judgment on disputed questions of law, this procedural ruling is unprecedented; it has no basis in California statutory or case law. However, the appellate panel's procedural innovation is immaterial to the proper resolution of this case. The facts placed in evidence by the County, taken alone, are clearly insufficient to prove that its development exaction complies with this Court's holdings in *Nollan* and *Dolan*.

In *Dolan v. City of Tigard*, this Court established that local governments bear the burden of proving that their development exactions do not violate the Takings Clause of the Fifth Amendment. In the case at bar, *Dolan* places the burden on the County to show, through an ***individualized determination***, that the exaction imposed on Jones was roughly proportional to the harmful effects that could be attributed to Jones' construction of a single-family affordable home.

The facts set forth by the County in support of its motion for summary judgment fall far short of this requirement.

Instead of an individualized determination of the impact of Jones' project, the County's own facts show that its exaction was based on excessive County spending in arbitrarily selected budget accounts, predating Jones' development by more than two years. The facts advanced by the County Study show conclusively that the County fee was established with no reference whatsoever to the actual impact of Jones' proposed construction of a manufactured home. Indeed, the facts advanced by the County were so deficient, the court below was forced to ***assume facts not in evidence*** to provide a rationalization for the County's actions. App. A-23.

The record is clear that the County has utterly failed to carry the burden of proof placed on it by this Court's *Dolan* decision. Its exaction must therefore be struck down as a regulatory taking--***as a matter of law***--regardless of the weight assigned to Jones' own evidence. Since the County has failed to carry its burden of proof, the unwarranted procedural ruling of the court below, by which it would exclude Jones' interpretation of the County Study, is merely dicta. Any realistic application of *Dolan* to the record below would have left the California court no choice but to strike down the County Fee as a violation of the Takings Clause.

II

THE DECISION BELOW HAS CONTRIBUTED TO A GROWING CONFLICT BETWEEN THE STATE COURTS OF CALIFORNIA AND NEW YORK IN RESOLVING FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

In addition to conflicting with the holdings of this Court, the regulatory takings decisions of the state courts of California have come into direct conflict with the New York State Court of Appeals on federal takings issues. This conflict between the courts of the most populous states of the Union on federal constitutional questions can only be resolved by a timely and forceful ruling by this Court.

A. The Opinion Below Is the Latest in a Series of California Decisions That Conflict with the Treatment of Federal Takings Issues by the New York State Court of Appeals

In contrast to the labored efforts of the California judiciary to evade this Court's teaching in *Nollan* and *Dolan*, the highest court of the State of New York has applied the heightened standards of review set forth in these cases to

strike down overzealous regulation of private property both facially and as applied. While the California Court of Appeal was evading *Nollan* by concocting the "possessory takings" doctrine of *Blue Jeans Equities*, the New York State Court of Appeals promptly acknowledged that

> the "close nexus" test ... requires "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d at 1068.

In *Seawall Associates v. City of New York*, the Court of Appeals overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter alia*, Local Law 9 violated the Takings Clause on its face.

The trial court, ruling on the heels of *Nollan*, noted that "[t]he *Nollan* decision seems to indicate that most regulations will now be subjected to a higher level of scrutiny than that previously utilized in determining claims of regulatory takings." *Seawall Associates v. New York*, 138 Misc. 2d 96, 523 N.Y.S.2d 353, 366 (Sup. Ct. N.Y. Cty 1987). The court went on to strike down the regulation, applying what it saw as the "new standard of heightened scrutiny." *Id.*

On appeal, the Court of Appeals applied similar reasoning. Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, a 5-2 majority found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 542 N.E.2d at 1069. The court expressly recognized and applied "semi-strict or heightened judicial scrutiny of

regulatory means-ends relationships'" as required by *Nollan*. 542 N.E.2d at 1068.

B. The Conflict Between the New York and California Courts Has Intensified Because New York Now Follows This Court's Dolan Decision While California Does Not

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 857. In striking down a rent control measure under the Takings Clause, the New York panel observed that *Nollan* and *Dolan* "establish a ***constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause.***" 618 N.Y.S.2d at 860 (emphasis added). Applying the heightened scrutiny required by this Court, the Court of Appeals found that the challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*. *Id.* at 858.

In sharp contrast to the New York court's regard for the Supremacy Clause, California has responded to *Dolan* by concocting a new rationale to evade this Court's regulatory takings doctrine.

In *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, the California Court of Appeal began by reviving the discredited *Blue Jeans Equities* doctrine, alleging that this Court has mandated heightened scrutiny only for "possessory takings." *Id.* at 1074 n.8. The California panel then cites *Dolan* in proclaiming that no regulatory taking can occur unless a regulation ***both*** fails to substantially advance a legitimate interest ***and*** deprives the owner of all economically viable use of his property! *Id.* at 1074-75. Thus, instead of joining New York in applying the stricter standard of review

mandated by this Court in *Dolan*, California has turned back the clock by 15 years, garbling the *Agins v. City of Tiburon* standard so as to arrive at a more deferential test for regulatory takings than this Court has ever accepted!

C. The Opinion Below Highlights the Conflict in the Treatment of Federal Takings Claims by the New York and California Courts

In the case at bar, this Court's *Dolan* ruling was simply shrugged off as irrelevant. The court below cited the discredited California decision, *Blue Jeans Equities West v. City and County of San Francisco*, and its progeny for the proposition that "*Nollan* does not control" in cases involving regulatory takings, as opposed to permanent physical invasions of land. App. A-9. The appellate panel then held that, as a matter of law, *Dolan's* requirement of an individualized determination of rough proportionality was met by a fee based on excessive county spending incurred up to 30 years before the application of the fee in question to any specific property. App. A-18-19. Finally, faced with the County's manifest failure to carry its burden of proof as required by *Dolan*, the court below simply assumed the existence of facts sufficient to justify the County's actions. App. A-23.

By adopting a stance of abject deference to the predatory policies of local regulators, the court below has come into direct conflict with the rigorous application of *Nollan* and *Dolan* by the New York State Court of Appeals. This Court should grant certiorari in order to resolve this conflict between the two largest states in the nation on important federal questions arising under the Takings Clause.

CONCLUSION

This case highlights a festering conflict between the regulatory takings doctrine of this Court and decisions of the California state courts involving important federal questions arising under the Takings Clause of the Fifth Amendment to the United States Constitution. By upholding the validity of a development fee derived from county budget deficits incurred as much as 30 years prior to the application of the fee, the opinion below implicitly repudiates federal constitutional protections guaranteed by this Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The opinion below, and the line of California decisions it is part of, also conflicts with the treatment of federal takings claims raised in the state courts of New York.

When a development exaction is challenged as a regulatory taking, this Court has held that the measure must be closely scrutinized under a heightened standard of review. *Nollan*, 483 U.S. at 834 n.3. The local government imposing the exaction must bear the burden of proof. *Dolan*, 129 L. Ed. 2d at 320. The government must show, through an individualized, quantified determination that the exaction is roughly proportional to the adverse impacts that would otherwise result from the owner's proposed use of his land. *Dolan*, 129 L. Ed. 2d at 320.

The highest state court of New York has forthrightly applied *Nollan* and *Dolan* to strike down intrusive property regulations challenged under the Takings Clause of the federal Constitution. In *Seawall Associates v. City of New York*, the New York Court of Appeals expressly recognized and applied "'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships'" in the context of a facial regulatory taking challenge. 542 N.E.2d at 1068. Five years later, the New York court followed *Dolan* in striking down a property regulation for not "substantially advancing a closely and legitimately connected

State interest." *Manocherian v. Lenox Hill Hospital*, 618 N.Y.S.2d at 858.

The reaction of California's state courts to *Nollan* and *Dolan* has been much different. Rather than implement the mandate of this Court, the California judiciary has repeatedly grasped for ways to "distinguish" *Nollan* out of existence. The most notorious example of this trend is *Blue Jeans Equities West v. City and County of San Francisco*, in which a California appellate court held that *Nollan* was limited to instances of "possessory" takings--an undefined figment of the court's imagination which has never been mentioned in any Supreme Court opinion. 3 Cal. App. 4th at 169.

This Court implicitly overruled *Blue Jeans Equities* in its latest regulatory takings decision, *Dolan v. City of Tigard*, accompanied by the vacation and remand of *Ehrlich v. City of Culver City*. The court below was presented with the first post-*Dolan* opportunity to break with the discredited obstructionism of *Blue Jeans Equities* and its progeny and make a serious effort to implement the requirements of *Nollan* and *Dolan*. Unfortunately, it chose not to do so.

By citing approvingly to the discredited *Blue Jeans Equities* holding, the court below refused to acknowledge that *Nollan's* heightened scrutiny applies to development fees like the one at issue. App. A-9-10. By approving the validity of a development fee imposed with no showing of any relationship to the actual impact of Jones' proposed use of his land, the court below made a mockery of *Dolan's* requirement of rough proportionality between such an exaction and the mitigation of harms which would be caused by the proposed property use. App. A-18-19. Finally, by assuming facts not in evidence to justify the adoption of the County Fee, the court below demonstrated that it would not require the County to bear its burden of proof, as mandated by this Court in *Dolan*. App. A-23.

The opinion below clearly demonstrates that California's appellate courts are still unwilling to acknowledge the authority of the United States Supreme Court in upholding individual rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

It is time for California courts to break with their oppressive tradition of extreme deference to land use regulators and, like the New York Court of Appeals, recognize that this Court has established a ***floor of constitutional protection*** for property owners that must be maintained by all courts, state and federal. *Manocherian v. Lenox Hill Hospital*, 618 N.Y.S.2d at 860. This Court should grant review in order to reconcile the deferential scrutiny of land use exactions employed by the California courts with the heightened standards of review mandated by this Court and applied by the New York State Court of Appeals.

For the reasons set forth above, petitioner Michael Q. Jones, Inc., respectfully urges this Court to grant the petition for writ of certiorari.

DATED: April, 1995.

Respectfully submitted,

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APPENDIX A

A-1

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
NOV 03 1994
KEVIN A SWANSON, Clerk
By _____
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MICHAEL Q. JONES, INC.,	F018725
Plaintiff and Appellant,	(Super. Ct. No. 33345)
v.	
COUNTY OF TUOLUMNE,	**OPINION**
Defendant and Respondent.	

APPEAL from a judgment of the Superior Court of Tuolumne County. James R. Hardin, Judge. (Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.)

Pacific Legal Foundation, [R]onald A. Zumbrun, James S. Burling, Orrin F. Finch and R. S. Radford for Plaintiff and Appellant.

Stephen Dietrich, Jr., County Counsel, Paul Griebel, Deputy County Counsel, McDonough, Holland & Allen, Natalie E. West and Mark Wasser, for Defendant and Respondent.

Michael Q. Jones, Inc. (Jones) appeals from a judgment entered in favor of the County of Tuolumne (County) in Jones's suit challenging the County's collection of certain fees as a condition of the issuance of a building permit for the development of a parcel of real property owned by Jones. We will affirm.

FACTUAL AND PROCEDURAL HISTORY

In 1980 the County adopted a general plan providing, among other things, that new development would be required to pay its proportionate share of the cost of new public facilities made necessary by such new development. In 1988 the County commissioned a study by the University of California Cooperative Extension to determine the net cost of future residential, commercial, and industrial development (UC Study). The final report of the UC Study, entitled "Tuolumne County Government Cost and Revenue Study: An Analysis of Current 1988 and Future 2020 Impacts to On-Going and One-Time General Fund Costs and Revenues," was released in August 1990.

Based upon the contents of the UC Study, the County proposed to collect development impact fees to make up the difference between the purported anticipated costs to the County of providing services and capital improvements for residential and industrial (but not commercial) development and the purported anticipated revenues likely to be generated by such development (primarily in the form of property and sales taxes). Accordingly, on October 23, 1990, the

County adopted Ordinance No. 17961[3] imposing "County Services Impact Fees," payable prior to issuance of building permits for new residential and industrial development projects. The ordinance provided that the amount of the fees would be established by resolution.

On December 4, following public hearings, the County adopted Resolution 381-90 establishing the amount of the impact fees based upon the UC Study and upon additional computations by county staff. The particular fee pertinent to the present case--for residential development within the Tuolumne County Fire District--was set at $1,681.77 per dwelling unit, plus an administrative charge of 2.5 percent.

In March of the following year, Jones applied to the County for a permit to install a mobile home at a residential development within the fire district. The County assessed him a fee of $1,723.81 (including the administrative fee) which Jones paid under protest.

In April, Jones filed, as one document, a complaint against the County for declaratory and injunctive relief and a petition for writ of administrative mandamus. Jones sought to invalidate the County Services Impact Fee on several grounds: taking of property without just compensation (both facially and as applied) in violation of the applicable provisions of both the United States Constitution and the California Constitution; unauthorized tax; double taxation; violation of due process; and violation of equal protection.

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[3] The County asserts the ordinance numbered 1796 should correctly have been numbered 1797. Jones does not dispute this assertion nor is the number material to the issues presented by this appeal.

The County demurred to some of Jones's causes of action, including the fourth which alleged the fee was a form of double taxation. The court sustained the demurrer to this count without leave to amend.

The County later moved for summary judgment or summary adjudication with respect to the surviving causes of action. Jones filed a cross-motion for summary judgment. After a hearing, the court granted the County's motion and denied Jones's motion. In part, the court concluded that regardless of the standard of review to be applied, "... there is supporting evidence that the Ordinance was implemented only after a detailed study demonstrated a substantial connection between development and the problem sought to be addressed."

Jones filed a timely appeal from the judgment later entered upon the court's order. The parties agreed to proceed on appeal by filing a joint appendix in lieu of a clerk's transcript (Cal. Rules of Court, rule 5.1).

DISCUSSION

Jones contends the court erred in sustaining the demurrer to his action based upon a claim of illegal double taxation, and in granting summary judgment as to his cause of action based upon an alleged uncompensated taking of his property.

1. Summary Judgment - Uncompensated Regulatory Taking.

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as

to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc.,[4] § 437c, subd. (c).)[5] Although summary judgment is often characterized as a drastic remedy, "if there is no material fact to be tried and the sole question is whether the claim of the moving party is tenable on the undisputed facts, the trial court's obligation is to determine that issue of law. [Citation.] On appeal, the reviewing court determines de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.]" (Redevelopment Agency v. International House of Pancakes. Inc. (1992) 9 Cal.App.4th 1343, 1348.) In other words, we must assume the role of the trial court and reassess the merits of the motion. (Chevron U.S.A.. Inc. v. Superior Court (1992) 4 Cal. App.4th 544, 548.) In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. (North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal. App.4th 22, 30.)

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[4] All further references are to the Code of Civil Procedure unless otherwise noted.

[5] The motion in this case was decided before the 1992 amendments to section 437c became effective on January 1, 1993. All references to section 437c are to the version of the statute in effect at the time the trial court ruled on the County's motion.

"Takings" jurisprudence under the Fifth Amendment to the United States Constitution[6] has thus far generally differentiated between, on the one hand, government actions which involve an actual or de facto usurpation of all the benefits of ownership of real property and, on the other, those which involve only a regulation of the use of real property or a partial usurpation of its ownership. When a physical invasion of an entire parcel of real property has occurred, or when the owner is deprived of all economically beneficial or productive use of an entire parcel of real property, compensation is required without any "case specific inquiry into the public interest advanced by the restraint." (Lucas v. South Carolina Coastal Council (1992) 505 U.S. ___, ___ [112 S.Ct. 2886, 2892-2895; Yee v. City of Escondido (1992) 503 U.S. ____, ____ [112 S.Ct. 1522, 1526]; see Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App. 4th 1459, 1475.) However, where the governmental action only restricts in some discrete manner the permissible uses of the property, the question whether a compensable taking has occurred depends upon an "ad hoc factual inquiry." (Lucas v. South Carolina Coastal Council, supra, 505 ____, ____ [112 S.Ct. 2886, 2892-2895; Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., supra, 23 Cal.App.4th at p. 1476.) Apparently included in this latter class of cases are those where the government insists upon invading or taking possession of a portion, but not substantially all, of the parcel of real property at issue.

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[6] Although Jones's opening brief contains a statement that the trial court "deprived [Jones] of fundamental rights guaranteed by the ... California Constitution[]," nowhere in Jones's briefing is this assertion supported by any reasoned argument or statement of authorities. It therefore requires no discussion. (Estate of Randall (1924) 194 Cal. 725, 728-729; Rossiter v. Benoit (1979) 88 Cal.App.3d 706, 710.)

(See Dolan v. City of Tigard (1994) 512 U.S. ____ [114 S.Ct. 2309]; and Nollan v. California Coastal Com'n (1987) 483 U.S. 825.)

Jones argues that (1) the trial court failed to subject the County's impact fees to the "heightened" level of judicial scrutiny required by the United States Supreme Court's decision in Nollan v. California Coastal Com'n, supra, 483 U.S. at page 841; and (2) the county's development impact fees do not satisfy the Nollan standard because they bear no relationship to the mitigation of the public harm fairly attributable to Jones's proposed use of his property. The County disagrees with the claim that Nollan is controlling but argues the impact fees nevertheless withstand the Nollan test.

In Nollan, a condition imposed by the Coastal Commission to the issuance of a building permit required the owners of beach front property to grant a public access easement across their lot. The Supreme Court established a two-part test to determine whether a regulatory demand such as the one sought to be enforced by the Commission transgresses the takings clause of the Fifth Amendment. First, a land use regulation constitutes a "taking" if a sufficient connection ("essential nexus") does not exist between the "legitimate state interest" and the regulation. (Nollan, supra, 483 U.S. at p. 837.) Second, even if such an "essential nexus" is established, a "taking" occurs if the regulation is "'not reasonably necessary to the effectuation of'" the legitimate government purpose sought to be advanced by the particular regulation. (Id. at p. 834.) On this subject, the Supreme Court explained:

> "[O]ur opinions do not establish that [the standards to be applied to regulatory taking claims] are the same as those applied to due process or equal protection claims. To the

> contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [citation], not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective." (483 U.S. at p. 834, fn. 3; emphasis in original.)

The permit condition involved in Nollan was found to have violated the Fifth Amendment because the Commission failed to satisfy the first aspect of the two-part standard set by the Court; that is, the Commission did not demonstrate that an "essential nexus" existed between a legitimate public interest properly enforced by the Commission and the permit condition sought to be exacted from the landowner. As a result of this determination, the Court was not compelled to reach the question of whether the evidence established that the permit condition bore the required close relationship to the public purpose sought to be advanced by the Commission. (Nollan, supra, 483 U.S. at p. 838.) Recently, however, in Dolan v. City of Tigard, supra, [114 S.Ct. 2309], the Supreme Court addressed the second part of the Nollan matrix. The landowner sought to expand an existing store and pave a parking lot which served the store. As a precondition to the issuance of a permit for such work, the City required the landowner to dedicate (1) a portion of the subject real property which lay within a floodplain for a public greenway and (2) another strip which lay adjacent to the floodplain for a bicycle and foot path. The Supreme Court initially concluded that an "essential nexus" existed between the City's legitimate desires to prevent flooding (the purpose of the greenway) and to reduce street vehicle traffic in the area (the purpose of the path) and the dedications demanded by the City. It then turned to the issue left unexplored in Nollan -- whether "the degree of the exactions

demanded by the [city's] permit conditions bear the required relationship to the projected impact of [the landowner's] proposed development." (Dolan, at p. 2312.)

The Supreme Court concluded the findings made by the City were not "constitutionally sufficient to justify the conditions imposed by the city" on the landowner's building permit. (Dolan, 114 S.Ct. at p. 2318.) In doing so, the Court attempted to explain what it meant by the second prong of the Nollan test, as follows:

> "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (Dolan, at pp. 2319-2320.)

The Court then decided that (1) the city never established why "a public, as opposed to a private greenway, is required in the interest of flood control"; and (2) the city's conclusory finding, that the pathway "could" offset some of the increased vehicular traffic generated by the development, was entirely unquantified and therefore inadequate to justify the pathway condition. (Dolan, 114 S.Ct. at p. 2320.)

Whether the Nollan standard applies to regulations which compel the payment of a fee as a condition of the development of real property has been the subject of considerable judicial comment in this state. In general, the United States Court of Appeals for the Ninth Circuit has held that Nollan does not control in such circumstances (Commercial Builders v. Sacramento (1992) 941 F.2d 872, 874-875), as have a number of California Courts of Appeal. (See for example Tahoe Keys Property Owners' Assn. v. State Water

Resources Control Bd., supra, 23 Cal.App.4th at pp. 1474-1477; Blue Jeans Equities West v. City and County of San Francisco (1992) 3 Cal. App.4th 164, 169.) Instead, these courts have evaluated the fees in issue against a lesser standard of reasonableness. (See, e.g., Commercial Builders v. Sacramento, supra, 941 F.2d at pp. 874, 876 ["A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed."]; Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., supra, 23 Cal.App.4th at pp. 1478-1479 [government interest in imposing mitigation fees as a condition for approval of development must "reasonably relate" to the property in question and "reasonably serve" that interest].)

We find we need not enter the fray. As we will explain, even if we assume Nollan applies to the fees involved in this case, the record relevant to the County's motion does not demonstrate the existence of a triable issue of fact about the constitutional justification for the imposition of such fees.

Jones does not argue that the collection of any development impact fee, regardless of how calculated, for the purposes advanced by the county violated the United States Constitution. In the lingo and the analytical framework of Dolan, Jones does not dispute that (1) the County had a legitimate interest in providing for the financing of the costs of new services and facilities made necessary by new development, and (2) the requisite "essential nexus" existed between this governmental interest and the imposition, upon proponents of new development, of fees calculated to defray the portion of such costs likely not to be recovered by the revenue expected to be generated by the development. (See, e.g., Garrick Development Co. v. Hayward Unified School Dist. (1992) 3 Cal.App. 4th 320, 337 [finding "a clear and close connection" between fees for school facilities and new

residential development].) Rather, as counsel for Jones made clear at oral argument, Jones's challenge to the charges in issue focuses upon the method utilized by the county to arrive at the amount assessed to Jones on account of such charges. Specifically, Jones contends the fees levied against his proposed project constitute a Fifth Amendment "taking" because the County's projected future revenue shortfall, which the fees are intended to offset, is nothing more than the extension of a past (1989) budget deficit caused by past unrestrained County spending and not the product of a directed and specific evaluation of the anticipated costs and revenues of reasonably expected new development in the county. According to Jones, the County determined the purported difference between expected future property tax revenues and expected future expenditures for county services by extending the County's 1989 operating deficit over the next 30 years, and then applied simple arithmetic to determine the fee scale necessary to recoup the projected longterm deficit. In other words, Jones takes the position the fees do not satisfy the second part of the Nollan/Dolan test because they are not reasonably and closely related in nature and extent to the effectuation of the County's purpose in imposing them. (See Dolan v. City of Tigard, supra, 114 S.Ct. at p. 2319-2320.) As we will explain, the defect in this argument is its lack of support in the evidence relevant to the resolution of the county's motion for summary judgment.

As it was required to do by subdivision (b) of section 437c, the County accompanied its motion with a "Separate Statement of Undisputed Facts [etc.]," which listed 22 proposed "undisputed material facts" and identified the evidence included in the moving papers relied upon by the County to support each such proposed fact. In pertinent part, the County's proposed undisputed facts were in substance as follows:

a. In 1988 the County commissioned a study to examine the net cost to the County from residential, commercial, and industrial development. The study was performed by economists associated with the University of California at Berkeley. The final report of the study, entitled "Tuolumne County Government Cost and Revenue Study: An Analysis of Current 1988 and future 2020 Impacts to On-Going and One-Time General Fund Costs and Revenues" (the Report), was issued in August 1990. (Fact No. 5)

b. The Report includes changes by personnel of the County Planning Department which did not affect the integrity of the Report. (Fact No. 6)

c. The County Board of Supervisors examined the Report and held public hearings on the contents of the Report. The Board determined that new development should, in accord with the County General Plan, pay its fair share of the net cost to the County caused by that development, and directed that the Planning Department calculate development impact fees based upon the Report. (Fact No. 7)

d. A planning department official was responsible for the calculation of the impact fees, which were derived directly from the Report. (Fact No. 8.)

e. The Report concluded that the cost to the County of serving residential and industrial development exceeds the County revenue brought in by the development. For example, a new residential development requires additional county services and facilities such as sheriff's services, recreational facilities and programs, and expanded library space. Also, to a lesser extent, employees working at a new industrial development use County services and facilities. (Fact No. 9.)

f. The impact fees levied by the County are based on two types of costs: (1) the cost of expanding existing

buildings and other capital facilities to meet the growing residential population and growing employment in the County ("one-time capital costs"); and (2) the ongoing cost of providing County services to new residents and businesses ("ongoing costs"). Both costs were calculated based on the cost to the County of maintaining then-current (fiscal year 1988-1989) levels of service. These costs are offset to some extent by the property taxes paid by new residential and industrial owners, by the sales taxes paid by residents and employees on purchases in the County, and by state and federal subventions based on population, leaving a net cost to the County. (Fact No. 10.)

g. The derivation of the fees for ongoing net costs is based on a per capita analysis of the revenue generated by new development and the costs of providing services to that new development. (Fact No. 11.)

h. The fees for ongoing net costs for residential development were calculated by:

(i) considering the ongoing costs the County incurs in providing services to County residents, including General Government Administration, Public Protection; Public Ways and Facilities; Health, Sanitation, Public Assistance and Education; Recreation; and Enterprise and Service Funds. The report determined a per-resident annual cost in the unincorporated area of the County of $252.58. (Fact No. 12.)

(ii) Revenues generated from residential development, as calculated by the report, are $233.43 per resident.

(iii) The net cost for residential development, therefore, is $19.14 per year, derived by subtracting the cost per resident ($252.58) from the revenue per resident ($233.43). The annual cost is converted to a cost per dwelling unit by multiplying $19.14 by the average number

of residents per dwelling unit in the unincorporated area of the County (2.64). Therefore, the rounded net cost per dwelling unit is $50.54 ($19.14 x 2.64).

(iv) Since the $50.54 net cost is an annual, recurring cost, the County established a fee that would provide an annual return sufficient to cover the net cost. The California State Association of Counties advised the County that the County could reasonably expect a 7 percent annual rate of return; therefore, the $50.54 annual net fee was divided by 7 percent, resulting in a residential fee of $722. (Fact No. 12.)

i. The fees for ongoing costs for industrial development were calculated by:

(i) considering the ongoing costs the County incurs in providing services to employees within the County, including General Government Administration; Public Protection; Public Ways and Facilities; Health, Sanitation, Public Assistance and Education; Recreation; and Enterprise and Service Funds. The report acknowledged that employees need different and fewer County services than County residents. The report determined a per-employee annual cost in the unincorporated area of the County of $163.89.

(ii) Revenues generated from commercial and industrial development, as calculated by the report, are $187.45 per employee.

(iii) The average employee generates a net surplus of revenue over costs of $23.65, when no differentiation is made between commercial and industrial projects. However, commercial projects involve more expensive structures and improvements than industrial projects and provide substantially more property tax revenue to the County than do industrial projects. In addition, commercial projects are apt to generate a larger amount of revenue from sales tax than will industrial projects. Therefore, commercial projects

generate a net surplus, while industrial development generates a net cost per employee of $46.35 per year, or $0.09 per square foot, assuming an average of 500 square feet per employee.

(iv) Since the $0.09 net cost of industrial development is an annual, recurring cost, the County established a fee that would provide an annual return sufficient to cover the net cost. The California State Association of Counties advised the County that the County could reasonably expect a 7 percent annual rate of return; therefore, the $0.09/square foot/year is divided by 0.07 to yield a rounded per-square-foot industrial fee of $1.29. (Fact No. 13.)

j. The County determined that since commercial development is not a net burden on the County, no impact fees will be charged for commercial development. (Fact No. 14.)

k. The report also evaluated current capital facilities and determined the costs of new capital facilities necessary to serve each resident or employee. The capital facilities include office space, jail facilities, fire equipment and facilities (within the fire service area), library facilities and recreational facilities. The fee is different for areas inside and outside the area served by the Tuolumne County Fire Department (TCFD). TCFD provides fire protection services to approximately 72 percent of the County, the remainder being served by local fire protection districts. Therefore, fees for capital facilities for the TCFD are charged to those projects within the TCFD's service district only. (Fact No. 15.)

l. (i) The fees for capital costs for residential development within the TCFD were calculated by multiplying the capital cost per resident ($363.54) by the average number of individuals per dwelling unit (2.64) to yield a rounded total capital cost of $959.77 per dwelling unit.

(ii) The fees for capital costs for residential development outside the TCFD were calculated by multiplying the capital cost per resident ($267.01) by the average number of individuals per dwelling unit (2.64) to yield a rounded total capital cost of $704.93 per dwelling unit. (Fact No. 16.)

m. (i) The fees for capital costs for industrial development within the TCFD were calculated by dividing the capital cost per employee ($242.36) by the square feet of building space occupied by that employee (500) to yield a rounded total capital cost of $0.48 per square foot of building space.

(ii) The fees for capital costs for industrial development outside the TCFD were calculated by dividing the capital cost per employee ($178.01) by the square feet of building space occupied by that employee (500) to yield a rounded total capital cost of $0.36 per square foot of building space. (Fact No. 17.)

n. On October 23, 1990, the County Board of Supervisors adopted Ordinance No. 1797 (erroneously numbered 1796) adding Chapter 3.50 to the Tuolumne County Code. The Board found, in Ordinance No. 1797, that "New development creates a need for construction or expansion of public improvements and public services to mitigate the impacts caused by the development." The ordinance established a fee to be imposed on development projects within the County; the amount of the fee would be established by resolution. (Fact No. 18.)

o. On December 4, 1990, the County Board of Supervisors adopted Resolution 381-90, establishing development impact fees which were effective 60 days after adoption of the resolution. The resolution recited that noticed hearings on the fees were held on October 9, 16, and November 13, 1990. The resolution also recited that the

Board, on October 9, 1990, had reviewed the Report, as supplemented by the County, and that the Report had been available for public review at least 10 days before the public hearing. The resolution contains findings establishing that the fees are necessary to protect the public health, safety, peace, morals, convenience, comfort, property and general welfare. (Fact No. 19.)

p. (a) Resolution 381-90 establishes the total fees set forth below:

Residential

Within TCFD

Capital Fee:	$959.77 per dwelling unit

Ongoing Costs

Fee:	$722.00 per dwelling unit
Total Fee:	$1,681.77 per dwelling unit

Outside TCFD

Capital Fee:	$704.93 per dwelling unit

Ongoing Costs

Fee:	$722.00 per dwelling unit
Total Fee:	$1,426.93 per dwelling unit

Industrial

Within TCFD

Capital Fee:	$0.48 per square foot

Ongoing Costs

Fee:	$1.29 per square foot
Total Fee:	$1.77 per square foot

Outside TCFD

Capital Fee:	$0.36 per square foot
Ongoing Costs	
Fee	$1.29 per square foot
Total Fee:	$1.65 per square foot

(b) The resolution also levies an administrative fee of 2.5 percent of the total fee to cover costs of collecting and accounting of the fees. (Fact No. 20.)

Jones's opposition to the motion included, as it should have under subdivision (b) of section 437c, a "[] Response [etc.] to the County's separate statement. However, in this response, Jones agreed that all of the county's proposed undisputed facts were indeed undisputed, with the exception of portions of proposed facts 15 and 19.[7] Surprisingly, Jones did not put forth any additional facts for the trial court's consideration in ruling upon the motion. In particular, Jones's opposition did not include any evidence which supported a finding by a trier of fact that the development fees charged to Jones were based upon a 1989 general fund deficit and were unrelated to any rationally determined projected costs of future County services made necessary by rationally determined projected future development. As a consequence of Jones's acceptance of most of the facts advanced by the County and Jones's failure to proffer any evidence on its part which supported its contention, the facts relevant to the question whether the trial court properly granted the motion are those unchallenged

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[7] The recitation of the county's proposed undisputed facts in the preceding section of this opinion takes into account Jones's two objections to the county's proposed facts. We do not express any opinion concerning the merits of those objections.

"undisputed facts" contained in the county's separate statement and set out above, all of which we must accept as established for all relevant purposes. (§ 437c, subd. (b); Hurley Construction Co. v. State Farm Fire & Casualty Co. (1992) 10 Cal.App.4th 533, 540-541; Melorich Builders, Inc. v. Superior Court (1984) 160 Cal.App.3d 931, 934-935.)

We find the facts produced by the County and agreed to be undisputed by Jones sufficient to support a determination as a matter of law that the fees in issue reflected an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." (Dolan v. City of Tigard, supra, 114 S.Ct. at p. 2312.) We have already set out in detail the relevant portions of the County's separate statement; it is unnecessary to repeat them here. It is sufficient to say that according to the County's undisputed facts, the fees were not based upon a simple extension of any 1989 general fund budget "deficit." Nor were they intended to force newcomers to pay for services and improvements already provided to the existing population. Rather, the undisputed facts justify a conclusion the fees were calculated so as to require the proponents of new development to pay their representative proportionate share of the net costs of extended government services and capital improvements, which the new residents were expected to actually receive and which were made necessary by new development within the County.

Unlike the situations in Nollan and Dolan, the impacts sought to be mitigated by the fees in issue here were not site specific, immediate, or caused directly and entirely by any one projected development. Instead, the impacts addressed by the fees were incremental over time, each new development contributing to, but not being solely responsible for, the overall future need to enlarge county services and construct or improve county facilities. The method by which the

County calculated and levied the fees in issue, as described in the County's undisputed facts left unquestioned by Jones, properly reflected the accretional nature of the relevant impacts. (See Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, 637-640 [requirement that subdivider dedicate land for recreational facilities does not require showing that project alone created the need for such facilities]; and Rohn v. City of Visalia (1989) 214 Cal.App.3d 1463, 1471 [property owner need not be the sole beneficiary of governmental action, but must be served directly or indirectly].)

In sum, in our estimation the County's determination of the proportionate share of anticipated future costs for new services and capital expenditures to be borne by each new development accomplished a "roughly proportional" (Dolan, 114 S.Ct. at p. 2319) distribution of responsibility for the whole of such costs among those who sought permission to develop new projects within the county. To the extent the undisputed facts reflect that certain estimates and assumptions were among the factors considered in setting the fees, the undisputed facts did not disclose that any such reckoning was unreasonable. (See U.S. v. Sperry Corp. (1989) 493 U.S. 52, 60 ["This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the Government need to record invoices and billable hours to justify the costs of its services. All that we have required is that the user fee be a 'fair approximation of the cost of the benefits supplied.' [Citation.]"].)

That Jones's memorandum of points and authorities in opposition to the County's motion for summary judgment may have included assertions the fees were nothing more than an extension of the County's 1989 budget deficit is irrelevant. Under section 437c, facts which do not appear in the responding party's separate statement cannot be considered. (North Coast Business Park v. Nielsen

Construction Co., supra, 17 Cal.App.4th at pp. 30-31; Blackman v. Burrows (1987) 193 Cal.App.3d 889, 894-895; see also United Community Church v. Garcin (1991) 231 Cal.App.3d 327, 337 [If a purportedly material fact is not set forth in a separate statement, it "does not exist"].) In addition, statements of purported fact contained in a memorandum of points and authorities do not constitute the "admissible evidence" required by section 437c, subdivision (b). (Cf. Melorich Builders v. Superior Court, supra, 160 Cal.App.3d at p. 934; Cochran v. Linn (1984) 159 Cal. App.3d 245, 250.)

It is likewise irrelevant that Jones's own cross motion for summary judgment may have included a separate statement which complied with section 437c, subdivision (b) by providing evidentiary support for the claim the fees were improper. Cross motions for summary judgment do not operate as a submission of the case to the court for judgment on the record presented by the two motions. (Borges v. Home Insurance Co. (1966) 239 Cal.App. 2d 275, 276; see also Coast Elevator Co. v. State Board of Equalization (1975) 44 Cal.App.3d 576, 583-584, overruled on another point in Culligan Water Conditioning v. State Board of Equalization (1976) 17 Cal.3d 86, 93, fn. 4; see also Tahoe Regional Planning Agency v. King (1991) 233 Cal.App.3d 1365, 1375, fn. 1.) Rather, the trial court must evaluate and determine each motion independently. (Tahoe Regional Planning Agency v. King, supra, 233 Cal.App.3d at p. 1375, fn. 1.) In this case, Jones's cross motion for summary judgment was denied. Jones does not raise any question about the propriety of this ruling on this appeal. The contents of Jones' papers in support of its motion therefore present nothing for our consideration. (Ibid; Borges v. Home Insurance Co., supra, 239 Cal.App.2d at p. 276.)

Jones believes that any deficiencies in its factual presentation in opposition to the County's motion for summary judgment were of no material consequence. It

claims both the existence and significance of the facts essential to Jones's legal position were before the trial court (and are therefore before us) because (1) Jones's core assertion the fees were grounded in nothing more than a 30-year extrapolation of a one-year county budget deficit was clearly argued to the trial court and to this court; and (2) proof of this assertion may be derived from a review and interpretation of the UC Study, which was appended to the County's moving papers, without the need for any additional evidence or outside explanations or guidance. This latter contention is simply not correct.

The UC Study consists of 34 pages of single spaced text, interspersed with tables and summaries of information, along with nine pages of appendix which set out additional supporting data and tables. We have reviewed all of it. We have been singularly unsuccessful in finding in any part of it anything which even vaguely reveals that the fees in issue were based upon a general fund deficit in 1989 or any other year. There is no statement directly or indirectly to that effect in the UC Study. There is a table which compares certain "per capita and per employee" general fund costs, broken down by particular sub-categories of services, and corresponding revenues. According to the UC Study, however, the identified sub-categories do not include all of the components of the county general fund for 1989. Thus, although the table does show negative balances in three of the four columns, there is nothing in it or in the accompanying text which, if believed, tends to prove that the county's total general fund expenditures for 1989 exceeded that year's general fund revenues. Indeed, under the relevant provisions of state law operative in 1989, a county was prohibited, in any year, from operating at a deficit as to any appropriated budget item. (Gov. Code, §§ 29009, 29120, 29121, 29122, 29300, 29301.) Although exceptions to this rule existed (see for example Gov. Code, §§ 29125, 29127),

the UC Study is bereft of anything which suggests any were effective or implemented during 1989.

In any event, it does not appear surprising that the UC Study apparently excluded from consideration those general fund categories which the investigators believed would not have been sensitive to development and population growth within the county; as we understand it, the whole point of the examination was to determine the difference between the costs and revenues of only those selected government services and facilities impacted by increased development. It is also not surprising that there was a difference between the balances of the costs and revenues attributable to the selected general fund categories examined in the UC Study. Presumably, had revenues been found to be sufficient to cover the costs of the services in question, there would have been no need to levy the fees in issue (as was the case with respect to commercial development), or at least the amount would have been less than actually charged. The same is essentially true about the capital costs component of the fees.

A conclusion that present and future County revenues are and will be inadequate to pay the costs attributable to the growth of government services and facilities resulting from predicted population growth is not astounding. It seems to us the real issue is not the existence of a "deficit," if any in the general fund or its components, but instead the accuracy and legitimacy of the data and assumptions underlying the calculations which resulted in the setting of the fees. This broad topic suggests many specific relevant questions. For example, is there an actual relationship between, on the one hand, development and population growth and, on the other, each separate component of each of the general fund sub-categories included in the UC Study; if so, what is the nature and extent of that relationship and is it also impacted by other factors not driven by development and growth which were not accounted for by the UC Study? Or, is the

projected need for the identified capital facilities reasonable? Or, are the costs, both actual and projected, attributable to those services shown to be effected by growth, or attributable to future capital expenditures, correct and reasonable, or instead are they inaccurate or inflated or unreasonable in some manner?

Jones did not present in opposition to the County's motion any admissible evidence which raised a triable issue about any of these or any other relevant topics. In addition, Jones did not contest any of the County's proposed undisputed facts and instead agreed, with two immaterial exceptions, that each was "undisputed." Jones's virtual abandonment of any challenge to the County's proposed facts operated as a waiver by Jones of all objections to every part of the County's proposed facts, as well as to every part of the evidence (including the UC Study) which stood behind such proposed facts. (Hurley Construction Co. v. State Farm Fire & Casualty Co., supra, 10 Cal.App.4th at pp. 540541.) Thus, the trial court was, and this court is, required to accept under section 437c all the statements and conclusions in the county's separate statement as true for purposes of the motion, without regard to their objective validity or the substantiality or admissibility of the evidence on which they were based. (Hurley at pp. 540-541.)

Jones chides the trial court for "adopting the County's bald assertions as fact," but that is precisely what Jones did for purposes of section 437c when Jones (1) agreed the County's proposed facts were undisputed and (2) failed to present any evidence on Jones's part which tended to prove the claimed deficiencies in the UC Study or the failure of the UC Study to meet the constitutional standards set by Nollan and Dolan. Jones simply neglected to comply with its procedural responsibilities under California law to demonstrate the existence of a triable issue with respect to the impropriety of the fees under the Fifth Amendment to the United States Constitution.

A characterization of this decision as "technical" is not inaccurate. But section 437c is a technical, as well as a complicated, statute. The appellate courts have added to the statute's inherent complexity by developing a large body of case law interpreting and implementing it. There is almost no flexibility in the procedural imperatives of the section, and the issues raised by a motion under it are, as we earlier noted, pure questions of law. Any arbitrary disregard of the statutory commands in order to bring about a particular result raises procedural due process concerns. (Chevron U.S.A., Inc. v. Superior Court, supra, 4 Cal.App.4th at p. 553.) As a result, section 437c is usually unforgiving, and a failure to comply with any one of its myriad requirements, as construed by the courts, is almost always fatal. The success or failure of the motion must be assessed solely by reference to the moving and opposing papers in the context of the procedural and substantive demands of the statute, and nothing more or less.

2. Demurrer - Double Taxation.

When reviewing a dismissal based on a demurrer, an appellate court must accept as true all allegations which are not contrary to law or a fact of which the court may take judicial notice. (Casella v. City of Morgan Hill, supra, 230 Cal.App.3d at p. 48.) A demurrer admits all facts properly pleaded, but does not admit contentions, deductions, or conclusions of fact or law alleged therein. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 898, pp. 338-339.) A demurrer should be sustained without leave to amend "where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law." (Lawrence v. Bank of America (1985) 163 Cal. App.3d 431, 436.)

Jones contends the County's impact fees are a form of double taxation in violation of article 13, section 1 of the

California Constitution[8] because they will be used to pay for facilities and services which might otherwise be funded by property taxes were it not for limitations on the County's ability to collect such taxes. Thus, Jones argues, "property owners who engage in activities requiring a building permit are required to pay both the ad valorem property tax and the property-based 'impact fee' to receive the same general services other county residents receive for their property taxes alone."

In Associated Home Builders etc., Inc. v. City of Walnut Creek, supra, 4 Cal.3d 633, subdivision developers challenged the constitutionality of a city ordinance requiring them, as a condition to approval of a subdivision map, to dedicate land or pay in lieu fees for park and recreation facilities. The developers argued, inter alia, that the requirement forced them not only to pay the initial cost of the facilities but also to pay a second time for their development and maintenance by way of property taxes. The court rejected this argument:

> "Double taxation occurs only when 'two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same taxing period.' [Citation.] Obviously the dedication or fee required of the subdivider and the property taxes paid by the later residents of the subdi-

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[8] Article 13, section 1 provides in part: "(a) All property is taxable and shall be assessed at the same percentage of fair market value." Although section 1 makes no express reference to double taxation, it has been said the Constitution impliedly prohibits it. (See, g Witkin, Summary of Cal. Law (9th ed. 1989) Ch. 12, 102, p. 129, and cases cited therein.)

> vision do not meet this definition. If Associated's claim were valid the prior residents of a community could also claim double taxation since their tax dollars were utilized to purchase and maintain public facilities which will be used by the newcomers who did not contribute to their acquisition." (Id. at p. 642, fn. omitted.)

Likewise, in Russ Bldg. Partnership v. City and County of San Francisco (1987) 199 Cal.App.3d 1496, the court held a transit development impact fee was not a form of double taxation. "The Ordinance is a development fee, not a tax. ... It is charged one time, at the completion of construction of new office space, and does not recur as does a property tax. Furthermore, the transit fee is designed specifically to fund [the transit system's] maintenance and development, whereas a property tax provides general revenue to cover a wide range of municipal services." (Id. at p. 1509.) Further, "the transit fee is not imposed by virtue of property ownership, but is a fee for the privilege of developing real property and to defer increased costs of transit services. As such, it is identical to the fee imposed in Associated Home Builders. As a matter of law, the imposition of the transit fee does not result in double taxation." (Id. at p. 1510.)

Associated Home Builders dictates the same result in this case. We are bound to follow applicable decisions of this state's highest court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455.) The complaint discloses that the fee is imposed one time, for a specific purpose. Most importantly, the complaint on its face also discloses that, unlike the property tax, ownership of the real property alone does not give rise to liability for the fee. Instead, the fee is exacted only when the owner seeks the privilege of developing the property. (See Russ Bldg. Partnership v. City and County of San Francisco, supra, 199 Cal.App.3d at p. 1510.) Accordingly, imposition of the

fee does not violate the constitutional proscription against double taxation.

Sacramento Mun. Utility Dist. v. County of Sonoma (1991) 235 Cal.App.3d 726 did not involve an allegedly double tax and thus is not helpful to Jones. In that case, county voters approved an ordinance imposing a special tax on the generation of electricity from geothermal sources. The special tax applied only to entities exempt from property tax; it was expressly intended to recover from those entities the tax revenues lost to the county as a result of the exemption. Notwithstanding the county's argument that the tax was imposed on the privilege of generating electricity rather than on the ownership of property, the court concluded the tax was for all practical purposes "an impermissible substitute for a property tax on publicly owned property" and therefore violated the constitutional exemption of public property from property taxes. (Id. at p. 733.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

//signed//
Dibiaso, J.

WE CONCUR:

//signed//
Martin, Acting P.J.

//signed//
Bissig, J.*

* Judge of the superior court, sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

B-1

FILED
92 AUG 20 PM 4:30
TIMOTHY R. JOHNSON, CLERK
BY IRENE MATOZA
DEPUTY

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TUOLUMNE

- - - ooo - - -

MICHAEL Q. JONES, INC.	)	No. 33345
Plaintiff and Petitioner,	)	ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT
vs.	)	
COUNTY OF TUOLUMNE; ALL PERSONS INTERESTED IN THE MATTER OF VALIDITY OF THE COUNTY SERVICES IMPACT FEE,	)	
Defendant and Respondent.	)	

This matter came on regularly for hearing July 10, 1992. R.S. Radford, Esq., appeared on behalf of plaintiff, Michael Q. Jones, Inc. Natalie E. West, Esq., appeared on behalf of defendant, County of Tuolumne. Plaintiff and defendant have each filed motions for summary judgment seeking to have this action resolved without further proceedings.

The court has considered the motions, pleadings, declarations (including the declaration of Angus McDonald), points and authorities, the separate statements and responses to undisputed facts, written and oral arguments in support of and in opposition to the respective motions.

The Court finds:

1. The material facts raised by the motions are essentially undisputed resulting in no triable issue as to a material fact; the issue raised by the motions, therefore, is one of law, not of fact.

2. Under Tuolumne County's adopted General Plan new development is to pay its pro rata share of the local cost of expansions in facilities and services which it generates and on which it is dependent.

3. Tuolumne County is vested with the authority under its police powers to adopt and impose development fees to mitigate the impacts of development within the unincorporated area of the county.

4. To implement the mandates of the General Plan, Tuolumne County, in 1988, commissioned a study to examine the net cost to the County resulting from residential, commercial and industrial development.

5. The final version of that study entitled "Tuolumne County Government Cost and Revenue Study: An Analysis of Current 1988 and Future 2020 Impacts to

On-Going and One Time General Fund Costs and Revenues, was submitted to the County in August, 1990.

6. After examination, changes, and numerous public meetings on the study, Tuolumne County, through its Board of Supervisors on October 23, 1990, adopted its Ordinance No. 1796 adding Chapter 3.50 to the Tuolumne County Ordinance Code to Establish a County Services Impact Fee on Development Projects, directing the fees be established by Board of Supervisor Resolution.

7. By resolution of the Board of Supervisors of Tuolumne County, December 4, 1990, Resolution No. 386-90 was adopted establishing the fees to be charged for new development under Tuolumne County Ordinance No. 1796.

8. The resultant findings of the Board of Supervisors in adopting Ordinance No. 1796 were: " . . . that the fees hereby established will be imposed to maintain a level of governmental services provided to the public that does not exceed that currently in existence as required to serve the needs created by new development. New development creates this need in direct proportion to the past, and estimated future costs of providing public services."

9. Whether Tuolumne County Ordinance 1796 and its implementing Resolution be analyzed under the standards set out in Nollan v. California Coastal Commission (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677; Commercial Builders v. Sacramento (1991) 941 F 2d 872; or in Blue Jeans Equities West v. City and County of San Francisco (1992) 3 CalApp 4th 164 [4 CalRptr 114] there is supporting evidence that the Ordinance was implemented only after a detailed study demonstrated a substantial connection between development and the problem sought to be addressed.

10. The nexus between the fee provision of the defendant County Ordinance and Resolution at issue is

designed to further the County's legitimate interest in development and the consequent burden of maintaining its required level of public services and facilities.

11. Plaintiff is not entitled to judgment in its favor with respect to the legal issues raised by its motion, and that defendant, Tuolumne County is entitled to judgment in its favor.

By reason of the foregoing, it is, therefore, ordered that plaintiff's motion for summary judgment is denied, and that the motion for summary judgment by defendant, Tuolumne County, be and it is hereby granted.

Defendant, Tuolumne County, shall prepare, serve, and submit the form of summary judgment.

DATED: August 20, 1992.

//signed//
JUDGE OF THE SUPERIOR COURT

APPENDIX C
C-1

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
NOV 21 1994
KEVIN A. SWANSON, Clerk
BY _____
Deputy

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MICHAEL Q. JONES, INC., Plaintiff and Appellant, v. COUNTY OF TUOLUMNE, Defendant and Respondent.	F018725 (Super. Ct. No. 33345) **ORDER DENYING REHEARING**

The petition for rehearing in the above entitled matter is denied.

Dated: NOV 21 1994

Original Signed
Dibiaso, J.

I CONCUR:

Original Signed
Martin, Acting P.J.

APPENDIX D

D-1

Fifth Appellate District
No. F018725

SO43834

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MICHAEL Q. JONES INCORPORATED,
Appellant

v.

COUNTY OF TUOLUMNE, DEPUTY
Respondent

SUPREME COURT
FILED
JAN 25 1995
Robert Wandruff Clerk

Appellant's petition for review DENIED.

Arabian, J. is of the opinion the petition should be granted.

LUCAS

Chief Justice

APPENDIX E

E-1

ORDINANCE NO. 1796

AN ORDINANCE ADDING CHAPTER 3.50 TO THE TUOLUMNE COUNTY ORDINANCE CODE TO ESTABLISH A COUNTY SERVICES IMPACT FEE ON DEVELOPMENT PROJECTS

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The Board of Supervisors of the County of Tuolumne ordains as follows:

SECTION 1: A new Chapter 3.50 is added to the Tuolumne County Ordinance Code to read:

CHAPTER 3.50

County Services Impact Fees

3.50.010 Purpose. The Board of Supervisors finds:

1. New development creates a need for construction or expansion of public improvements and public services to mitigate the impacts caused by the development;

2. Adequate funding to accommodate this need for public facilities is not available;

3. A County Services Impact Fee is necessary to finance these additional public necessities by requiring development to pay its fair share, to implement the County General Plan, section II.9,D and VI.6, and to ensure that adequate public facilities are available to protect the public health, safety and welfare.

3.50.020 Definitions. Words when used in this chapter, and in resolutions adopted under its authority, shall have the following meanings:

A. "Development Project" means any project undertaken for the purpose of development. "Development Project" includes a project involving the issuance of a

permit for construction or reconstruction, but not a permit to operate.

B. "Fee" means a monetary exaction, other than a tax or special assessment, which is charged to an applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees for park and recreational uses pursuant to Government Code section 66477, fees collected in connection with a development agreement adopted pursuant to Title 7, Chapter 4, Article 2.5, (commencing with section 65864) of the Government Code, or fees imposed pursuant to a reimbursement agreement with the applicant to pay for public facilities that exceed the need attributable and reasonably related to the development project.

C. "Applicant" means an owner, leasee of record, or an agent authorized in writing.

D. "Public Facilities" includes public improvements, public services and community amenities.

Section 3.50.030 Establishment of Fees. There is established a fee to be imposed on each development project approved by the County. The Board of Supervisors by resolution shall:

1. Establish the amount of the fee to be imposed on each type of development project;

2. Identify the purpose of the fee;

3. Identify the specific use to which the fee is to be put;

4. Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed;

5. Determine how there is a reasonable relationship between the need for the public facility and the impacts caused by the type of development project on which the fee is imposed; and

6. Determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

3.50.040 Expenditure and Reimbursement of Fees.

A. Fees subject to this chapter, shall be deposited, invested, accounted for and expended pursuant to California Government Code section 66006. The fees shall be held in separate public facility accounts by the Auditor to be expended for the purpose for which they were collected. The auditor shall allocate fee interest accrued to the accounts for which the original fee was imposed.

B. The Auditor shall report to the Board of Supervisors once each fiscal year on any portion of a fee remaining unexpended or uncommitted in an account five (5) or more years after deposit and identify the purpose for which the fee was collected. The Board shall make findings once each fiscal year with respect to any fees reported on to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged.

C. The Board of Supervisors shall order a re-fund of unexpended or uncommitted fees for which a need cannot be demonstrated, along with accrued interest, to the then current record owner(s) of lots or units of the development project(s) on a prorated basis. The Auditor may refund these fees by direct payment or by off-setting other obligations owed to the County by the then current record owner(s) of the development project(s).

D. If the administrative costs of refunding unexpended or uncommitted fees revenues exceed the amount to be refunded, the Board of Supervisors after a public hearing, for which notice has been published pursuant to Government Code section 6061 and posted in three (3) prominent places within the area of the affected development project, may determine that the fee revenues shall be allocated for some other purpose for which the fees are collected subject to this chapter that serve the project on which the fee was originally imposed.

3.50.050 Fee Payment.

A. Except as provided herein, prior to the issuance of a certificate of occupancy or date of final inspection which ever occurs first, the applicant for a development project shall pay to the County Building Department the fee amount adopted by Board resolution. No blue tab for permanent electrical service may be issued by the Building Department on a development project until the date of final inspection or issuance of a certificate of occupancy.

B. If the Board of Supervisors establishes an account and appropriates funds for a public facility and adopts a Capital Improvement Plan (CIP) pursuant to Government Code section 66002 for a public improvement, thereafter, fees shall be paid prior to issuance of a building permit. If a CIP is adopted, the Planning Director shall schedule and notice an annual public hearing before the Board of Supervisors to update the CIP which may be incorporated into the process for review of the public works program pursuant to Board of Supervisors resolution No. 330-76.

C. If subdivision B does not apply to a development project then the Building Department shall, prior to issuance of a building permit, require the applicant to execute a contract to pay the fee within the time required by subdivision A.

D. The fee amount shall be determined by the fee schedule in effect on the date a vesting tentative map or vesting parcel map is approved, or the date a building permit is issued, whichever occurs first.

E. When application is made for a new building permit following the expiration of a previously issued building permit for which fees were paid, an additional fee payment shall be required, only if the fee schedule has been increased during the interim.

F. In the event that subsequent development occurs with respect to property for which fees have been paid, additional fees shall be required only for additional development that was not included in computing the prior fee.

G. When a fee is paid for a development project and that project is subsequently reduced so that it is entitled to a lower fee, the County Building Department shall recompute the fee and the County Auditor shall issue a partial refund of the fee based on the recomputation.

H. When a fee is paid for a development project and the project is subsequently abandoned without any further action beyond the obtaining of a building permit, the County Auditor shall refund the fee paid, less any administrative portion of the fee, upon Building Department written confirmation that the building permit has been cancelled.

I. No fee shall be due for the reconstruction of any residential, commercial or industrial development project that was damaged or destroyed as a result of a natural disaster, as declared by the Governor. Any reconstruction or portion thereof, which is not substantially equivalent to the damaged or destroyed property shall be deemed to be new construction and shall be subject to the applicable fee.

SECTION 2: This ordinance and resolutions adopted hereunder are exempt from the California Environmental Quality Act pursuant to Public Resources Code section 21080(b)(8). The Board of Supervisors finds that the fees hereby established will be imposed to maintain a level of governmental services provided to the public that does not exceed that currently in existence as required to serve the needs created by new development. New development creates this need in direct proportion to the past, and estimated future costs of providing public services.

SECTION 3: If any provision of this Ordinance or the application thereof to any person or circumstances is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application thereof, and to this end the provisions of this Ordinance are severable.

SECTION 4: This Ordinance shall take effect thirty (30) days after its adoption. The Clerk of the Board of Supervisors is hereby authorized and directed to publish a summary of this ordinance in the Union Democrat, a newspaper of general circulation printed and published in the County of Tuolumne, State of California, prior to fifteen (15) days after its passage.

After holding public hearings as required by law, the foregoing Ordinance passed and adopted at a regular meeting of the Board of Supervisors of the County of Tuolumne, State of California, on this 23rd day of October, 19 90, by the following vote, to wit:

AYES: Original Signed
NOES: None
ABSTAIN: None
ABSENT: None

//signed//
LARRY ROTELLI, Chairman,
Board of Supervisors, County of
Tuolumne, State of California

ATTEST: RUBY HAWORTH
Clerk of the Board of Supervisors

By //signed// (Seal)

APPROVED AS TO FORM:

STEPHEN DIETRICH, JR.,
County Counsel

By //signed//
PAUL GRIEBEL,
Deputy County Counsel

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
ATTEST: March 16, 1992

[SEAL] *Ruby Haworth*

**CLERK OF THE BOARD OF
SUPERVISORS, COUNTY OF
TUOLUMNE**

APPENDIX F

Filed December 4, 1990

No. 381-90 [SEAL] By //signed//

Clerk of the Board of Supervisors

RESOLUTION

OF THE BOARD OF SUPERVISORS OF THE COUNTY OF TUOLUMNE

WHEREAS, Ordinance No. 1796 adding Chapter 3.50 to the Tuolumne County Ordinance Code has been adopted to establish fees for development projects; and whereas public hearings have been held on October 9, 16, and November 13, 1990 with notice having been provided pursuant to Government Code Section 6062a; and

WHEREAS, a detailed study of the costs of providing public facilities to future development projects and a projection of public facilities needs through the year 2020 has been prepared by the University of California Cooperative Extension, titled "Tuolumne County Government Cost and Revenue Study: An Analysis of Current 1988 And Future 2020 Impacts To On-Going And One-Time General Fund Costs And Revenues", as supplemented by County staff, and reviewed by the Board of Supervisors on October 9, 1990; and

WHEREAS, this supplemented study and all supporting data were made available to the public at least ten (10) days prior to the public hearing;

THEREFORE, IT IS RESOLVED:

The Board of Supervisors finds:

1. This resolution sets fee amounts for the purpose of funding public facilities necessary to provide governmental services to the population increases expected in this County through the year 2020. The payment of these fees is also necessary to comply with policies of the General Plan;
2. The fees will be used to finance public facilities identified in the aforementioned Study;
3. Based on the Study, and the public testimony at the hearings, future development in the County will generate additional demands for public facilities;
4. There is a reasonable relationship between the fee's use and the development projects on which the fee is imposed because the fee will be expended solely on public facilities that will provide governmental services to the residents and employees occupying that development;
5. There is a reasonable relationship between the needed public facilities and the development projects on which the fee is imposed because the additional demands for public facilities will be generated in at least the same proportion to residents and employees occupying the new developments as presently exists

between existing public facilities and current residents and employees;

6. There is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development on which the fee is imposed because the amount of the fee on each project is determined by calculating the proportional cost of public facilities necessary to provide governmental services to the residents or employees occupying that development;

7. The fees set forth herein do not exceed the estimated reasonable cost of providing the public facilities for which the fee is imposed because the fee was calculated by using both actual costs of services and estimated costs of improvements needed to serve the development project and by setting the fee at an amount which would generate sufficient funds to pay those costs;

8. The study is a detailed analysis of the costs to provide governmental services in the County and the costs necessary to provide those services to new development;

9. The fee amount imposed on each project has a fair and reasonable relationship to that project's expected burden and benefit from the public facilities to be funded by the fee;

10. Adequate funds are not available to pay for those public facilities' needs generated by new development projects

and, therefore, it is necessary to impose these fees to ensure that adequate governmental services are provided to the persons occupying those projects;

11. The public health, safety, peace, morals, convenience, comfort, property and general welfare will be promoted by the public facilities paid for from these fees;

12. Failure to impose these fees will subject persons in the County to conditions harmful to their health and/or safety;

IT IS FURTHER RESOLVED that the amount of fees imposed on each type of project shall be as set forth below:

Residential Development:

Within the Tuolumne County Fire Department Service District $1,681.77/dwelling unit

Outside the Tuolumne County Fire Department Service District $1,426.93/dwelling unit

Industrial Development:

Within the Tuolumne County Fire Department Service District $1.77/square foot

Outside the Tuolumne County Fire Department Service District $1.65/square foot

The fee for industrial development shall be based upon the square footage of the floor area of all structures plus those areas used for storage of materials directly related to the industrial use.

IT IS FURTHER RESOLVED that the fees shall also be imposed on projects that add one or more bedrooms to an existing project on which the fee was not imposed in an amount per additional bedroom that is twenty-five

(25) percent of the fee that would otherwise be imposed on a new project of that type;

IT IS FURTHER RESOLVED that an administrative fee of two and one-half (2.5) percent of the sum of the appropriate fees described above shall be charged for each development project.

IT IS FURTHER RESOLVED that the payment of these fees does not exempt a development project from payment of additional fees or from additional exactions necessary to mitigate impacts not provided for by payment of the fees set forth herein;

IT IS FURTHER RESOLVED that the fee amount shall be reviewed in January, 1992, and every two (2) years thereafter. The Auditor shall, sixty (60) days before the review date, provide to the Planning Director a report of the public facilities paid for. The Planning Director shall report to the Board on these matters, whether a modification of the fee amount is recommended and if so what costs, public facilities needs, or inflation factors support the proposed modification. If such a recommendation is made, the Director shall notify the Clerk of the Board of Supervisors who shall set the matter for a public hearing and provide the notice set forth above. After a public hearing, the Board may modify the fee amount.

IT IS FURTHER RESOLVED that for each separate account or fund established for these fees, the Auditor shall, within 45 days of the close of each fiscal year, make available to the Planning Director and the public, a report on the beginning and ending balance for the fiscal year and the fee, interest, and other income and the amount of each expenditure by public facility and the amount of refunds (if any) made during the fiscal year. The Director shall schedule this matter for review

by the Board of Supervisors within fifteen (15) days of the availability of this information.

IT IS FURTHER RESOLVED that the County recognizes that the cost of providing services described in the Study have increased at an annual rate of 9.4%. Thus, it may be necessary for the County to expend more per year than the annual shortfall as shown in the Study in order to maintain service levels.

This resolution is effective sixty (60) days after passage.

ADOPTED BY THE BOARD OF SUPERVISORS OF
THE COUNTY OF TUOLUMNE ON DECEMBER 4, 1990

AYES: 1ST DIST. *Rotelli* NOES: ____ DIST. *None*
2ND DIST. *Hurt* ____ DIST. ____
3RD DIST. *Farr* ABSENT: ____ DIST. *None*
4TH DIST. *Fergeson* ____ DIST. ____
5TH DIST. *Hoster* ABSTAIN: ____ DIST. *None*

Larry A. Rotelli
CHAIRMAN OF THE BOARD OF SUPERVISORS

ATTEST: //signed// No. 381-90

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
ATTEST: *3/16/92*
//signed//
CLERK OF THE BOARD OF SUPERVISORS, COUNTY OF TUOLUMNE

Supreme Court, U.S.
F I L E D
MAY 2 2 1995
OFFICE OF THE CLERK

No. 94-1779

In the
Supreme Court of the United States
October Term, 1994

MICHAEL Q. JONES, INC.

Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,

Respondents.

**On Petition for Writ of Certiorari
to the Court of Appeal,
State of California, Fifth Appellate District**

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	2
I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT	3
A. The decision below did not decide whether the heightened scrutiny of *Nollan* and *Dolan* applies to development impact mitigation fees, but held that the County's fee met even the heightened standard of review set forth in those cases	3
B. The court below correctly upheld the fee, based on undisputed facts	6
C. This case presents only a narrow issue, turning on the County's method of calculating its fee	9
II. THE UNPUBLISHED OPINION OF THE COURT OF APPEAL NEITHER CREATES NOR CONTRIBUTES TO A CONFLICT BETWEEN THE STATE COURTS OF CALIFORNIA AND NEW YORK	10
A. The New York cases do not address the imposition of purely monetary development fees.	10
B. California courts are not refusing to follow *Dolan*..	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Agins v. Tiburon, 447 U.S. 255 (1980)	10
Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992), *cert. denied*, 113 S. Ct. 191 (1992)	4
Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983)	5
Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 37 Cal. Rptr. 2d 677 (1995)	10
Dolan v. City of Tigard, ___ U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)	*Passim*
Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 468 (1993), *vacated and remanded*, 114 S. Ct. 2731 (1994)	5, 6
Hensler v. City of Glendale, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 244 (1994), *cert. denied*, 115 S. Ct. 1176 (1995)	11
Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994), *cert. denied*, 63 U.S.L.W. 3707 (1995)	10
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	*Passim*
Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989)	10
Yee v. Escondido, 503 U.S. 519 (1992)	5

TABLE OF AUTHORITIES—Continued

Statutes	Page
California Government Code (West Supp. 1995)	
Sections 66000-66007	9
Section 66000(b)	9
Section 66001	9
Section 66001(a)(3)	9
Section 66001(a)(4)	9
Section 66001(b)	9
California Rules of Court	
Rule 977	2

No. 94-1779

In the

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MICHAEL Q. JONES, INC.

Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeal,
State of California, Fifth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent County of Tuolumne ("County") respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner Michael Q. Jones, Inc. ("Jones" or "Petitioner"), which seeks review of the unpublished opinion of the Court of Appeal, State of California, Fifth Appellate District, in which the court unanimously affirmed the summary judgment granted by the trial court.

STATEMENT OF THE CASE

Respondent Tuolumne County adopts and incorporates by reference the statement of facts as set forth in the decision of the California Court of Appeal, Fifth Appellate District. (App. A, A-2 to A-4.[1]) The County also incorporates the undisputed facts summarized in the opinion below at App. A, A-12 to A-18.

The California Supreme Court denied review of the Court of Appeal decision on January 25, 1995. (App. D.) Petitioner filed the Petition for Writ of Certiorari on April 24, 1995, and County received it on April 25, 1995. This Brief in Opposition is timely filed pursuant to United States Supreme Court Rule 15.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari asserts that the decision below has contributed to a growing conflict between California courts and the United States Supreme Court. This assertion is erroneous for several reasons.

First, the opinion of the California Court of Appeal, which upholds the imposition of a $1,723.81 county services impact mitigation fee on Jones, is unpublished. Pursuant to Rule 977 of the California Rules of Court, an opinion that is not ordered published "shall not be cited or relied on by a court or a party in any other action or proceeding [with exceptions not applicable here]." The decision below thus has no precedential value. The "contribution" of this unpublished decision to Petitioner's perceived conflict is non-existent.

Second, the opinion below does not even decide the first Question Presented for Review in the Petition for Writ of Certiorari. The California Court of Appeal did not decide whether the heightened standards of judicial review mandated by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987),

[1] All references in this brief to "App." are references to the Appendices to the Petition for Writ of Certiorari.

and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), apply to financial exactions in the form of development impact mitigation fees. Rather, the court assumed that the standards set forth in those cases did apply, and determined that Tuolumne County's development fees met those standards.

Third, the court below was entirely correct in upholding the fees, which comply with even the heightened standards set forth in *Nollan* and *Dolan*.

Fourth, the second Question Presented in the Petition, based on the erroneous assertion that the fee was based on a 30-year extrapolation of a general fund shortfall, relates to the particular circumstances of this case, and attempts belatedly to raise a factual issue that is completely unsupported by the record.

Finally, the Petition also asserts that the decision below conflicts with opinions of the New York Court of Appeals because the New York cases follow the *Dolan* decision while the California courts do not. Neither of the two New York cases on which Petitioner relies involve development impact mitigation fees or the applicability of *Dolan* to the calculation of such fees. Moreover, the decision below did apply the *Dolan* standards and presents no conflict with the New York cases.

I.

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT

A. The decision below did not decide whether the heightened scrutiny of *Nollan* and *Dolan* applies to development impact mitigation fees, but held that the County's fee met even the heightened standard of review set forth in those cases.

The first Question Presented in the Petition (at i) is: "Do the heightened standards of judicial review in regulatory takings cases, mandated by this Court in *Nollan v. California Coastal*

Commission and *Dolan v. City of Tigard*, apply to financial exactions in the form of development impact mitigation fees?" The County acknowledges that there may be some uncertainty as to whether the heightened scrutiny mandated by this Court in *Nollan* and *Dolan*, both of which involved exactions of land or interests in land, is applicable in the case of a purely monetary exaction of a fee based on a development's proportionate share of the costs imposed by all new development of that type.[2] This case is not, however, the proper case for review of that issue, for the simple reason that the California Court of Appeal did not decide it. The court below in fact applied the *Nollan* and *Dolan* standards to the fee at issue in this case.

Although Petitioner asserts that the State Courts of California have consistently refused to apply the heightened standards of review set forth by this Court in *Nollan* and *Dolan* (Petition at 10), the Court of Appeal in this case did not refuse to apply them. Petitioner alleges that the court below continued to cite *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992), *cert. denied*, 113 S. Ct. 191 (1992), for the proposition that *Nollan's* heightened standard of review does not apply to regulatory takings, and asserts that "the decision below extends an unbroken line of California cases that decide federal takings issues in a manner that directly conflicts with the settled jurisprudence of this Court." (Petition at 12.) In fact, however, while the California appellate court cited *Blue Jeans Equities* in a paragraph summarizing the "considerable judicial comment" on the applicability of the *Nollan* standard to regulations compelling payment of a fee (App. at A-9 to A-10), it then concluded:

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[2] The heightened scrutiny in *Nollan* and *Dolan* arose as a result of this Court's determination that when a public agency requires dedication of land or easements which vests outsiders with a right to pass across the landowner's property, it deprives the owner of one of the sticks in the bundle of rights that constitutes property, the right to exclude others. *Dolan v. City of Tigard*, 129 L. Ed. 2d at 316.

> We find that we need not enter the fray. As we will explain, even if we assume Nollan applies to the fees involved in this case, the record relevant to the County's motion does not demonstrate the existence of a triable issue of fact about the constitutional justification for the imposition of such fees.

(App. at A-10.)

After reviewing the undisputed facts in the case, the court below found that those facts were sufficient to support a determination as a matter of law that the fees in issue reflected an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." (App. at A-19, *citing Dolan v. City of Tigard*, 114 S. Ct. at 2312.) The court also determined that the County's determination of the proportionate share of costs to be paid by each new development accomplished the "roughly proportional" distribution of costs required by *Dolan*. (App. at A-20.) In brief, the court below explicitly applied the *Nollan/Dolan* standards.

Thus, the decision below does not constitute either a refusal by a renegade California court to follow the precedents of this Court (*see*, Petition at 10) or a California case that decides federal takings issues in a manner that conflicts with the jurisprudence of this Court (Petition at 12). There is no conflict. This Court's review of the first Question Presented in the Petition should await a case in which the court below squarely decides whether the *Nollan/Dolan* standards apply in fee cases, with a reasoned opinion supporting its decision.[3] (*See, Yee v. Escondido*, 503 U.S.

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[3] The Petition's allegation that this Court "emphasized the applicability of *Dolan* to development fees" by vacating the decision of the California Court of Appeal in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 468 (1993), and remanding for reconsideration in view of *Dolan*, 114 S. Ct. 2731 (1994) (Petition at 5; *see also*, 11), overstates the significance of that order. A remand order "should not be read as implying that [the intervening case] necessarily mandates reversal." *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983). The California Court of Appeal has issued an unpublished decision on remand in *Ehrlich*, and the California Supreme Court granted review on March 16, 1995. California Supreme Court No. SO33642.

519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of . . . lower court opinions squarely addressing the question.")

B. The court below correctly upheld the fee, based on undisputed facts.

The second Question Presented in the Petition asks the Court to determine the validity of a development fee, "based on a 30-year extrapolation of a one-time general fund revenue shortfall, imposed with no showing of any relationship to adverse impacts attributable to the owner's proposed use of his land . . . ." (Petition at i.) The California Court of Appeal correctly noted that Jones's challenge to the fee at issue focused upon the method utilized by the County to arrive at the amount assessed to Jones. (App. at A-11.)

Not only the Question Presented, but also Jones's Statement of the Case (Petition at 4) and Argument (Petition at 13), allege that the fee was based on a 30-year extrapolation of a single year's budget deficit.[4] The Court of Appeal rejected this argument:

> The UC Study consists of 34 pages of single spaced text, interspersed with tables and summaries of information, along with nine pages of appendix which set out additional supporting data and tables. We have reviewed all of it. We have been singularly unsuccessful in finding in any part of it anything

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[3] Continued

In any event, the ad hoc recreational facilities mitigation fee imposed in *Ehrlich* differs from the fee in this case, which was legislatively imposed on all new residential and industrial development.

[4] The Petition suggests that the same amount will be charged to all proposed residential units for the next 30 years. (Petition at 4; *see also*, 23.) However, County Resolution 381-90 provides for the fee amount to be reviewed every two years. (App. at F-5.) County Ordinance No. 1796, Appendix E, also provides for a review of unexpended or uncommitted fees after five years, and refunds of fees for which a need cannot be demonstrated. (App. at E-3, § 3.30.040 B, C.)

> which even vaguely reveals that the fees in issue were based upon a general fund deficit in 1989 or any other year.

(App. at A-22.)

By submitting the undisputed facts (summarized in the decision below at App. A-12 to A-18), the County met its burden of demonstrating that its residential fees were based on the increased costs attributable to new residential development. Jones did not dispute these facts.

> Surprisingly, Jones did not put forth any additional facts for the trial court's consideration in ruling upon the motion. In particular, Jones's opposition did not include any evidence which supported a finding by a trier of fact that the development fees charged to Jones were based upon a 1989 general fund deficit and were unrelated to any rationally determined projected costs of future County services made necessary by rationally determined projected future development.

(App. at A-18.) The decision below was based on the County's undisputed evidence.

The California Court of Appeal correctly determined that the fee meets the tests established by this Court. Clearly, payment of Tuolumne County's impact fee will "substantially advance a legitimate state interest" by providing revenue that the County must have in order to provide governmental services to new residents and employees. While all of the facilities provide important services, the largest component of the fee is "public protection" (police and fire services and facilities). The U.C. Study concludes that $13 million of the $18.25 million needed for capital facilities is being used to fund public protection, including fire equipment, jail, and courthouse facilities. (Joint Appendix in Lieu of Clerk's Transcript at 216, U.C. Study at 19.) These facilities promote the highest possible public interests – the prevention of death and injury to people and protection of property.

There is clearly a substantial relationship or "nexus" between the governmental interest in providing services and facilities to serve new development and the imposition of development fees. The fees were calculated separately for residential development, based on the services and facilities required by new residents, and for industrial development, based on the services and facilities required by new employees. (App. at A-13 to A-17.) No fees were imposed on commercial development, because the study found that such development did not result in net costs to the County. (App. at A-15, Fact No. 14.)

The California Court of Appeal correctly determined that the facts produced by the County and undisputed by Jones are sufficient to support a determination as a matter of law that the fees in issue reflected an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development." (App. at A-19, *citing Dolan v. City of Tigard*, 129 L. Ed. 2d 304 (1994).) The costs of new residential development were calculated on a per capita basis, and the fees were then calculated per dwelling unit. (App. at A-13 to A-14.) The fees varied depending on whether the property was within or outside of the fire district. (App. at A-15.)

Jones's residential project was a single dwelling unit within the fire district. This dwelling unit will have residents. The residents will require a pro rata share of facilities and services. The fee was calculated to pay for their proportionate share. It is thus erroneous to suggest, as the second Question Presented does, that the fee was imposed "with no showing of any relationship to adverse impacts attributable to the owner's proposed use of his land." (Petition at i.)

The County's fee was calculated in a manner that provides both an individualized determination and rough proportionality.

> [T]he undisputed facts justify a conclusion the fees were calculated so as to require the proponents of new development to pay their representative proportionate share of the net costs of extended government services and capital improvements,

> which the new residents were expected to actually receive and which were made necessary by new development in the County.

(App. at A-19.) The Court of Appeal correctly determined that the fee complies with the standard set forth in *Dolan*.

C. This case presents only a narrow issue, turning on the County's method of calculating its fee.

In its challenge to County's method of calculating the fees on its residential development, Jones completely fails to mention California Government Code Sections 66000-66007. These statutes were enacted in 1987 in response to this Court's decision in *Nollan*, and set forth the applicable standards for determining the validity of impact fees. Tuolumne County complied with those standards when it adopted its fees. Section 66000(b) defines "fee" to mean a "monetary exaction . . . which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ." Section 66001 (App. at 1-1, 1-2, *infra*) sets forth a number of standards that must be met when a local agency establishes, increases, or imposes a fee. The agency must determine that "there is a reasonable relationship between the fee's use and the type of development project . . . ." CAL. GOV'T CODE § 66001(a)(3) (West Supp. 1995). The agency must determine that "there is a reasonable relationship between need for the public facility and the type of development project . . . ." CAL. GOV'T CODE § 66001(a)(4) (West Supp. 1995). The agency must determine that "there is a reasonable relationship between the amount of the fee and the cost of the public facility. . . ." CAL. GOV'T CODE § 66001(b) (West Supp. 1995).

California Government Code Sections 66000-66007 require a California public agency to demonstrate the relationship between the impact of new development and the agency's requirement for payment of an impact fee. Petitioner did not challenge the California statutory scheme. The adequacy of California Government Code Sections 66000-66007 to ensure compliance

with this Court's decisions should be reviewed in a case that directly challenges those provisions, not in a case that turns on Tuolumne County's method of calculating its fee.

II.

THE UNPUBLISHED OPINION OF THE COURT OF APPEAL NEITHER CREATES NOR CONTRIBUTES TO A CONFLICT BETWEEN THE STATE COURTS OF CALIFORNIA AND NEW YORK

A. The New York cases do not address the imposition of purely monetary development fees.

Neither of the two New York cases cited in the Petition (*Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), *cert. denied*, 63 U.S.L.W. 3707 (1989), and *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994), *cert. denied*, 493 U.S. 976 (1995)), shed any light on the first Question Presented in the Petition. Neither involves the imposition of monetary development fees or the proper calculation of such a fee. Those cases do not raise or answer the question whether the heightened scrutiny of *Nollan* and *Dolan* applies to a purely monetary development fee imposed as a condition of approval of development that will burden public facilities and services. The Petition demonstrates no conflict between California and New York decisions on that issue, because the New York cases cited simply do not address it.

B. California courts are not refusing to follow *Dolan*.

The Petition alleges that "New York now follows this Court's *Dolan* decision while California does not." (Petition at 22.) For this proposition, the Petition cites a single California appellate decision, *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995), a case decided after the decision below in this case. Petitioner alleges that *Del Oro Hills* misstates this Court's holding in *Agins v. Tiburon*, 447 U.S. 255 (1980). (Petition at 22-23.) If so, the remedy lies in review of *Del Oro*, not in review of this case. The decision below correctly states this Court's *Agins* test. (App. at A-7.)

The only other reported California decision we have found citing *Dolan* is the California Supreme Court's decision in *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), *cert. denied*, 115 S. Ct. 1176 (1995), which is not a fee case. That case does not present a refusal to follow *Dolan*, which the California Supreme Court cites in its discussion of the Takings Clause. *Id.* at 10. There simply is no series of California cases refusing to follow *Dolan*.

In any event, the California Court of Appeal in the decision below actually did apply the *Dolan* standards, and held that the Tuolumne County fee met even the heightened standard of scrutiny. (App. at A-10, A-19 to A-20.) Jones may disagree with the County's method of calculating the fee in this case, but the precise method of calculating the fee hardly rises to the level of a conflict with the state courts of New York.

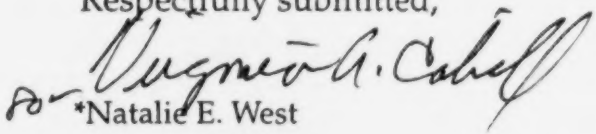
CONCLUSION

Jones seeks certiorari to review an unpublished decision by the California Court of Appeal upholding a $1,723.81 development impact fee on its residential development. For the reasons given above, there is no basis for granting the writ.

Respondent Tuolumne County respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: May 19, 1995

Respectfully submitted,



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APPENDIX 1

California Government Code Section 66001

§ 66001. Fee as condition of approval; agency requirements

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

(e) Except as provided in subdivision (f), the local agency shall refund to the then current record owner or owners of lots or units of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to subdivision (d). A local agency may refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended or uncommitted revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

(Added by Stats. 1987, c. 927, § 1, operative Jan. 1, 1989. Amended by Stats. 1988, c. 418, § 8.)

No. 94-1779

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

MICHAEL Q. JONES, INC.
Petitioner,

v.

COUNTY OF TUOLUMNE and
ALL PERSONS INTERESTED IN THE
MATTER OF VALIDITY OF THE COUNTY
SERVICES IMPACT FEE,
Respondents.

**Petition for Writ
of Certiorari
to the Court of Appeal,
State of California,
Fifth Appellate District**

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

I. BOILERPLATE ASSERTIONS OF COMPLIANCE WITH CALIFORNIA GOVERNMENT CODE §§ 66000-66007 CANNOT SUBSTITUTE FOR ACTUAL COMPLIANCE WITH THIS COURT'S REQUIREMENT OF AN ESSENTIAL NEXUS UNDER NOLLAN 2

II. RESPONDENT'S CLAIM THAT THIS IS AN INSIGNIFICANT CASE THAT WILL NOT CONTRIBUTE TO THE GROWING CONFLICT BETWEEN THE STATES IS CONTRADICTED BY THE PUBLIC STATEMENTS OF RESPONDENT'S COUNSEL 4

CONCLUSION 6

TABLE OF AUTHORITIES CITED

Page

Cases

Dolan v. City of Tigard, 505 U.S. ___, 129 L. Ed. 2d 304 (1994) 2,4-5

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479, 618 N.Y.S.2d 8576 (1994) 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2-5

Seawall Associates v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989) 4

Statute

California Government Code §§ 66000-66007 2-4

Rule

Supreme Court Rule 15.6 1

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Petition for Writ of Certiorari to the Court of Appeal, State of California, Fifth Appellate District

PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, petitioner Michael Q. Jones, Inc. (Jones), respectfully submits this Reply to the Respondent's Brief in Opposition (Opposition) served by respondent County of Tuolumne (County) on May 19, 1995.

In its Opposition the County argues for the first time that the fee at issue in this litigation in fact complies with the "substantial nexus" requirement of *Nollan v. California Coastal Commission* because such compliance is required by California Government Code (GC) §§ 66000-66007. This argument illustrates the extent to which California land use agencies have elevated form over substance, adopting boilerplate statements of compliance with GC §§ 66000-66007 ***as a substitute*** for actually complying with this Court's *Nollan* mandate.

The County also asserts that, as an unpublished decision, this case has no independent significance and will not contribute to the growing conflict between the states on questions of federal constitutional rights under the Takings Clause. This argument conflicts with public statements by respondent's counsel portraying the decision below as a landmark and urging the adoption of similar development fees--which would be struck down in other states as violative of *Nollan* and *Dolan*--throughout the State of California.

I

BOILERPLATE ASSERTIONS OF COMPLIANCE WITH CALIFORNIA GOVERNMENT CODE §§ 66000-66007 CANNOT SUBSTITUTE FOR ACTUAL COMPLIANCE WITH THIS COURT'S REQUIREMENT OF AN ESSENTIAL NEXUS UNDER NOLLAN

This case involves a constitutional challenge to a County development fee based on a simple 30-year extrapolation of a single year's revenue shortfall in selected general fund accounts. Petition for Writ of Certiorari (Petition) at 3-4. The California Court of Appeal upheld the fee against Jones' claim that the exaction effected a regulatory taking under this Court's holdings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and

Dolan v. City of Tigard, 505 U.S. ___, 129 L. Ed. 2d 304 (1994).

In its Opposition, the County does not dispute the fact that the fee in question was wholly determined by a study of a single year's operating deficit incurred by the County two years before Jones applied for the building permit that subjected him to the fee. Petition at 6. Likewise, the County does not allege that any individualized findings have ever shown a connection between the amount of the fee and the actual impact of Jones' use of his property. Petition at 15. Nevertheless, the County asserts that the fee must meet *Nollan's* requirement of a close, essential nexus to Jones' proposed project *because such a nexus is required by California law!* Opposition at 9-10.

In raising this argument, the County has unwittingly demonstrated the "gamesmanship" by which California land-use agencies routinely evade the constitutional requirements of this Court. It is true, as the County alleges, that California Government Code §§ 66000-66007 paraphrases *Nollan's* nexus requirements. However, the effect of this legislation has simply been to allow irresponsible California governments to adopt boilerplate statements of compliance with the Government Code *as an alternative* to actually complying with *Nollan*. As a case in point, the County's own assertion that it has complied with GC §§ 66000-66007 (set forth in County Resolution No. 381-90, Petition at F2-F3) is nothing more than a rubber stamp; the record shows that the County adopted these "findings" without conducting any inquiry whatsoever into whether such a nexus actually existed.

This is exactly the sort of evasion this Court foresaw when it warned that it viewed "the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan*, 483 U.S.

at 841. GC §§ 66000-66007 is neither clever nor especially imaginative; boilerplate assertions of compliance with this statutory scheme cannot serve as a proxy for actually meeting the strict constitutional standards this Court has set forth in *Nollan* and *Dolan*.

II

RESPONDENT'S CLAIM THAT THIS IS AN INSIGNIFICANT CASE THAT WILL NOT CONTRIBUTE TO THE GROWING CONFLICT BETWEEN THE STATES IS CONTRADICTED BY THE PUBLIC STATEMENTS OF RESPONDENT'S COUNSEL

As fully set forth in Jones' Petition, the decision below is the latest in a trend of California decisions conflicting with the federal constitutional jurisprudence of this Court and with that of the highest state courts of New York. Petition at 9-23. In its Opposition, the County argues for the first time that, because the decision below was unpublished, it does not contribute to this growing conflict.[1] Opposition at 2. This argument is wholly disingenuous, as

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[1] The County also claims that the decision below does not conflict with the recent opinions of the New York Court of Appeals because the New York cases, *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 8576 (1994), do not deal with monetary development exactions. Opposition at 10. This argument proves too much. While the California courts are still concocting excuses to restrict this Court's *Nollan* and *Dolan* rulings to a limited class of physical exactions, the New York courts have extended those rulings far beyond exactions of any kind, applying the essential nexus and rough proportionality tests to the general realm of property regulations.

demonstrated by the fact that counsel for the County has recently cited this case as establishing that similar unconstitutional fees can survive legal challenge, and promoting their adoption throughout the State of California.

In comments presented to the League of California Cities City Attorneys Conference on May 4, 1995, (Comments lodged concurrently with this Reply) opposing counsel in this case documents the conflict among state courts on the federal constitutional questions at issue in this litigation. Comments at 10. These comments also cite the present case as establishing the current position of the California courts on the applicability of *Nollan* and *Dolan* to development fees (Comments at 11), encouraging the adoption of similar schemes throughout the State of California. Comments at 18-19.

Clearly, Tuolumne County is well aware that the decision below comprises an important extension of a line of California cases conflicting with the opinions of this Court and the high courts of other states on important issues of federal constitutional rights. The County's representations to the contrary in its Respondent's Brief in Opposition are patently disingenuous and should be ignored by this Court.

CONCLUSION

For the reasons set forth above, petitioner Michael Q. Jones, Inc., again urges this Court to grant the petition for Writ of Certiorari.

DATED: June, 1995.

Respectfully submitted,

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